(24,304)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 198.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES T. WELSH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

	Original.	Print
Caption	a	1
Petition in error	1	1
Proceedings in the circuit court of Mahoning county	5	3
Petition in error	5	3
Docket entries	8	5
Journal entries	9	5
Judgment	9	6
Transcript of record from the court of common pleas of Mahoning county	10	6
Petition	10	6
Demurrer	14	8
Answer	15	9
Reply	16	9
Motion for new trial	17	10
Docket entries	19	11
Journal entries	20	12

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	Original.	Print
Order overruling demurrer	20	12
Verdict	22	13
Judgment	22	13
Bill of exceptions	23	13
Testimony of J. B. Kotheimer	23	13
C. A. Lidle	27	15
John Waldron	30	18
D. P. Conway	36	21
James T. Welsh	40	24
Edward Blauser	84	52
J. F. Ohldecker	92	57
Enos Wilkinson	96	60
C. C. Thorpe	98	61
Edward Blauser (recalled)	100	63
William H. Willis	101	63
M. C. Costley	114	71
Richard Condon	119	74
R. C. Wheeler	124	77
James T. Welsh (recalled)	127	79
Motion to direct verdict	129	81
Plaintiff's requests to charge	130	81
Defendant's requests to charge	132	82
Charge before argument	137	85
Charge after argument	140	87
Judge's certificate to bill of exceptions	150	92
Defendant's Exhibit 1—Affidavit of James T. Welsh	151	92
Plaintiff's Exhibit A—Photograph	153	93
Plaintiff's Exhibit B—Photograph	154	93
Clerk's return to writ of error	155	94
Petition for writ of error	156	94
Order allowing writ of error	160	96
Assignment of errors	162	96
Order allowing writ of error	173	102
Certificate as to Federal question	175	103
Writ of error	177	104
Citation and service	180	105
Bond on writ of error	182	106
Docket entries	185	107
Journal entries	185	108
Judgment	185	108
Clerk's certificate	186	109

a In the Supreme Court of the State of Ohio.

No. —.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Error to the Circuit Court of Mahoning County.

RECORD.

Hine, Kennedy & Manchester, Attorneys for Plaintiff in Error.
W. R. Stewart, Attorney for Defendant in Error.

1 In the Supreme Court of the State of Ohio.

No. —.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Petition in Error.

The above named plaintiff in error says, that at the September term for the year 1911 of the Court of Common Pleas of said Mahoning County, Ohio, to-wit: on the 5th day of December, 1911, the same being a day in said September term of court, a final judgment was rendered by said Court of Common Pleas against said plaintiff in error, Erie Railroad Company, in favor of said defendant in error, James T. Welsh, in a certain civil action then pending in said Court of Common Pleas, in which said James T. Welsh was plaintiff and this plaintiff in error was defendant,
2 by which judgment it was ordered that the said James T. Welsh recover from the said Erie Railroad Company the sum of Five Thousand Dollars, together with costs of suit; that subsequently, to-wit: on the 1st day of April, 1912, said plaintiff in error commenced a proceeding in error in the Circuit Court of Mahoning County, Ohio, and therein filed its petition in error against said defendant in error, for the purpose of reversing said judgment of said Court of Common Pleas, and that at the October term, 1912, of said Circuit Court, to-wit: on October 24th, 1912, said Circuit Court in said proceeding in error rendered its judgment against this plaintiff in error, and in favor of the said James T. Welsh, affirming the judgment and proceedings of said Court of Common Pleas in said action.

All of the original pleadings between the above named parties and the full record of said action in said Court of Common Pleas,

including the bill of exceptions, allowed and signed at the trial of said action, together with duly certified copies of the docket and journal entries of the said Court of Common Pleas, and also duly certified copies of the docket and journal entries and record of said Circuit Court in said proceeding in error are hereto attached, marked "Circuit Court Exhibit A," and made a part of this petition in error.

The said plaintiff in error avers that there is manifest error in the record and proceedings of said Circuit Court and said Court of Common Pleas prejudicial to this plaintiff in error, in this, to-wit:

First. Said Court of Common Pleas erred in overruling the demurrer of defendant filed to the petition of plaintiff below.

3 Second. Irregularities in the proceedings of said Court of Common Pleas, by which defendant therein was prevented from having a fair trial.

Third. The verdict in said action is not sustained by sufficient evidence, but is against the manifest weight thereof.

Fourth. That said verdict is contrary to law.

Fifth. Said Court of Common Pleas erred in refusing to charge the jury as requested in writing by defendant therein before argument.

Sixth. Said Court of Common Pleas erred in refusing to direct a verdict in favor of defendant therein at the conclusion of the evidence therein.

Seventh. Said Court of Common Pleas erred in refusing to direct a verdict in favor of plaintiff in error at the conclusion of all the evidence in said action.

Eighth. Said Court of Common Pleas erred in its general charge to the jury.

Ninth. That said verdict and judgment in said Court of Common Pleas and said judgment of said Circuit Court are against the right, privilege and immunity especially set up and claimed by plaintiff in error under the constitution, statutes and laws of the United States.

Tenth. That said Court of Common Pleas erred in refusing to apply the laws of the United States to the situation of the parties in said action, in this, to-wit:

That plaintiff in error claimed a right, privilege and immunity from liability upon the ground and for the reason that a certain Federal Statute, namely: that Act commonly known as The Employers' Liability Act of Congress of April 22nd, 1908, ap-

4 plies to the situation of the parties to the exclusion of any and all legislation of the State of Ohio upon the same subject, and that under the provisions of said Act, defendant in error, the said James T. Welsh, assumed the risks incident to the situation whereof he complained, providing he knew, or ought to have known of the same; that said claim of plaintiff in error was denied by said Court of Common Pleas, and is denied by the verdict herein complained of, and the decision is against the right, privilege and

immunity so especially set up and claimed by plaintiff in error as aforesaid.

Eleventh. That said Circuit Court erred in the same manner as the said Court of Common Pleas, in refusing to apply the laws of the United States to the situation of the parties in this action as aforesaid.

Twelfth. That plaintiff in error was denied the protection of the laws of the United States in said verdict, and the decision of said Circuit Court and the Court of Common Pleas is against its rights claimed thereunder.

Thirteenth. That there was error of law occurring at the trial and excepted to by plaintiff in Error.

Fourteenth. Said Court of Common Pleas erred in overruling the motion of this plaintiff in error for a new trial.

Fifteenth. That said judgment is contrary to law.

Sixteenth. Said judgment is not sustained by sufficient evidence and is contrary to the evidence given at the trial of said cause.

Seventeenth. That said Court of Common Pleas at the time of said cause committed other errors of law prejudicial to said plaintiff in error, all of which are manifest on the record filed herewith.

5 Eighteenth. Said Circuit Court erred in affirming the judgment of said Court of Common Pleas, and in rendering judgment against said plaintiff in error, when it should have reversed the judgment of said Court of Common Pleas and rendered judgment against said defendant in error, and in favor of said plaintiff in error.

Wherefore, plaintiff in error prays that the judgment of said Circuit Court and said Court of Common Pleas may be reversed, set aside and held for naught; that it may be restored to all things it has lost by reason of said judgments, and that a final judgment be entered in this court in favor of said plaintiff in error, and against said defendant in error.

HINE, KENNEDY & MANCHESTER,
Attorneys for Plaintiff in Error.

(Waiver omitted.)

Circuit Court.

Petition in Error.

(Filed Apr. 1, 1912.)

The above named plaintiff in error, Erie Railroad Company, for its petition in error, says: The above named James T. Welsh, defendant in error, at the September Term for the year 1911 of the Court of Common Pleas of said Mahoning County, Ohio, recovered a judgment by the consideration of said court against this plaintiff in error for the sum of Five Thousand Dollars ($5,000.00), together with costs of suit, in a certain civil action then pending in said Court of Common Pleas wherein the said James T. Welsh was plaintiff,

and this plaintiff in error was defendant; that said judgment
6 was rendered by said Court of Common Pleas on the 5th day of December, 1911, the same being a day in said September Term of court.

The original pleadings and papers in said action, together with a full record of all proceedings had therein, including the bill of exceptions taken and allowed at the trial of said cause, together with certified copies of the docket and journal entries made in said action in said Court of Common Pleas, are hereto attached, marked "Exhibit A" and made a part of this petition in error.

The above named plaintiff in error says that there is error in said action and proceedings in said Court of Common Pleas manifest on said record, and prejudicial to this plaintiff in error in the following particulars, to-wit:

First. Said Court of Common Pleas erred in overruling the demurrer of defendant below to the petition of plaintiff below.

Second. Irregularities in the proceedings of said Court of Common Pleas by which defendant below was prevented from having a fair trial.

Third. That the verdict in said action is not sustained by sufficient evidence, but is against the manifest weight thereof.

Fourth. That said verdict is contrary to law.

Fifth. That said Court of Common Pleas erred in admitting incompetent evidence offered by defendant in error against and over the objection of plaintiff in error.

Sixth. Said Court of Common Pleas erred in refusing and excluding competent evidence offered by plaintiff in error.

7 Seventh. Said Court of Common Pleas erred in refusing to charge the jury as requested in writing by plaintiff in error before argument.

Eighth. Said Court of Common Pleas erred in refusing to direct a verdict in favor of plaintiff in error at the conclusion of the evidence of defendant in error.

Ninth. That said Court of Common Pleas erred in refusing to direct a verdict in favor of plaintiff in error at the conclusion of all the evidence in said action.

Tenth. Said Court of Common Pleas erred in its general charge to the jury.

Eleventh. That said verdict is against the right, privilege and immunity especially set up and claimed by plaintiff in error under the Constitution, Statutes and Laws of the United States.

Twelfth. That said court erred in refusing to apply the laws of the United States to the situation of the parties in this action in this, to-wit:

That plaintiff in error claimed a right, privilege and immunity from liability upon the ground and for the reason that a certain Federal Statute, namely: that Act commonly known as The Employers' Liability Act of Congress of April 22nd, 1908, applies to the situation of the parties to the exclusion of any and all legislation of the State of Ohio upon the same subject, and that under the provisions of said Act, defendant in error assumed the risks incident to

the situation whereof he complained, providing he knew, or ought to have known of the same; that said claim of plaintiff in error was denied by the court, and is denied by the verdict herein com-
8 plained of, and the decision is against the right, privilege and immunity so especially set up and claimed by plaintiff in error as aforesaid.

Thirteenth. That plaintiff in error was denied the protection of the laws of the United States, and said verdict and decision *is* against its rights claimed thereunder.

Fourteenth. That there was error of law occurring at the trial and excepted to by plaintiff in error.

Fifteenth. Said Court of Common Pleas erred in overruling the motion of this plaintiff in error for a new trial.

Sixteenth. That the judgment, so rendered by said Court of Common Pleas in favor of defendant in error, and against plaintiff in error, is contrary to law.

Seventeenth. That the judgment so rendered against plaintiff in error is not sustained by sufficient evidence and is contrary to the evidence given at the trial of said cause.

Wherefore, plaintiff in error prays that said judgment so as aforesaid rendered by said Court of Common Pleas in favor of said defendant in error against this plaintiff in error may be reversed, set aside and held for naught, and that plaintiff in error be restored to all things it has lost thereby.

HINE, KENNEDY & MANCHESTER,
Attorneys for Plaintiff in Error.

(Waiver omitted)

Circuit Court.

Docket Entries.

April 1st, 1912.—Petition in Error, waiver, transcript, original papers and bill of exception filed.

9 Oct. Term, 1912.

Oct. 24, 1912.—Hearing; Affirmed without penalty at costs of Pl'ff in Error, and remanded. J. 6, Page 288.

Journal Entries.

J. 6, Page 288, October Term, A. D. 1912, to-wit: Oct. 24th.

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Mahoning County, Ohio, in the case of James T. Welsh vs. The Erie Railroad Company, and was argued by counsel. Upon consideration whereof the court finds that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas, and in

its opinion substantial justice has been done the party complaining as shown by the record of the proceedings, and judgment under review.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said Court of Common Pleas, in said action be, and the same are hereby, in all things, affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error, no penalty is assessed.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, for which execution is awarded; and that a special mandate be sent to the Court of Common Pleas of Mahoning County to carry this judgment into execution.

10 To all of which holdings, orders and judgment the plaintiff in error excepts.

(Duly certified.)

In the Court of Common Pleas.

JAMES T. WELSH, Plaintiff,
vs.
ERIE RAILROAD COMPANY, Defendant.

Petition.

(Filed May 4, 1911.)

Plaintiff, for his cause of action says, the defendant, Erie Railroad Company, is, and at all times mentioned herein was, a railroad corporation, organized and existing under and by virtue of the law of the State of New York, and as such corporation, owned and operated a double track line of railroad with railroad yards and sidings running through the city of Youngstown, and through what is known as the Moiser Yards in Brier Hill, Ohio.

That on or about the 7th day of March, 1911, and for some time prior thereto, the plaintiff was in the employ of the defendant as a yard conductor, working about the yards of said company at Mosier. That on or about the 7th day of March, 1911, at about 11 o'clock P. M., while in a blinding snow storm, the plaintiff stepped off the foot-board of a locomotive, used by him and his crew for the purpose of going to the office at the east end of the Mosier yard

11 for the purpose of receiving orders which was his duty to defendant at that time.

That in connection with the tracks and yard at Mosier aforesaid, defendant maintained switches which were operated by means of wires running along through the yard and about the tracks to a tower wherein the switches were operated by means of a lever.

That when plaintiff stepped off of said locomotive as aforesaid, he undertook to step in the space or run-way between the east bound and west bound main tracks and in so doing he stepped upon a pulley wheel which was used in connection with the wires running

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from said tower to said switches. As soon as he stepped upon said pulley wheel it turned and threw him toward said wires, which were running across said space and run-way between said tracks, and which entrapped his feet and threw him headlong under the wheels and in the machinery of said locomotive which was in motion thereby inflicting upon him permanent injury more particularly hereinafter described.

That said pulley wheel and wires were wholly without protection or covering and that by reason of their being so exposed rendered the walks and ways about the tracks and between said tracks where plaintiff was obliged to walk and work, unsafe and dangerous, as they were without signal lights and could not be seen in the darkness; and in the night season formed a trap composed of wires stretched immediately across the run-way between said tracks so that employees might be entrapped thereby while discharging their duties to the defendant in the night season.

12 Plaintiff says, that he did not know, when he stepped off of said locomotive, that he would step upon said pulley wheel and become entrapped in said wires and thrown under and against said moving locomotive as aforesaid, as he was unable to see in the darkness and storm, and thought he was alighting from said locomotive in a place of safety, and avers the fact to be that he did not have equal means with the defendant of knowing the location of said pulley wheel and wires in the darkness as did the defendant, and that said injury was caused without any fault or negligence upon his part.

Plaintiff says, that the defendant knew, or by the exercise of ordinary care could or should have known that said wires and pulley wheel were uncovered and that said wires were stretched across the run-way where employees were obliged to work and travel were without signal lights in the night season, and could not be seen in the storm and darkness, and were extremely unsafe and dangerous; that defendant knew or by the exercise of ordinary care, could and should have known, that the walks and ways about the tracks in said yard and about said run-way where plaintiff was obliged to work were extremely unsafe and dangerous by reason of said unguarded wires and pulley wheel.

Plaintiff complains of the defendant, that it was unlawfully careless and negligent in failing to properly guard or cover said wires and pulley wheel in and about said runway, and thus protect its employees from danger of being entrapped in the darkness and thrown under moving cars; that it was unlawfully careless and negligent in failing to provide safe walks and ways about which plaintiff

13 could discharge his duties to the defendant in the darkness and storm without being entrapped and thrown under moving cars and injured; that defendant was unlawfully careless and negligent in failing to provide a signal light about said exposed wires and pulley wheel in said run-way, so that plaintiff, in discharging his duties to the defendant might have seen said pulley wheel and wires and thus escaped injury to himself; that defendant was unlawfully careless and negligent in the maintenance of the

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walks and ways of said tracks in said yard where plaintiff was obliged to work, and that it failed to keep them safe and free from the dangers which caused plaintiff's injury as aforesaid.

Plaintiff said that his injury was the direct and proximate result of the defendant's negligence aforesaid; that as a proximate result of said injury the muscles, tendons and nerves of his left arm at the elbow and his left hand were bruised, contused and lacerated, and he believes said injury is permanent; that as a proximate result of said injury, the bones in his left arm at and about the elbow were crushed and broken, and he believes said injury is permanent; that as a proximate result of said injury, the bones of the center of his left hand and his thumb and first three fingers thereof, were broken and crushed, and he believes said injury is permanent; that as a proximate result of said injury, his left index finger is amputated at the first joint; that as a proximate result of said injury, the elbow of his left arm has become stiff, and he believes said injury is permanent; that as a proximate result of said injury his left thumb and first three fingers of said hand have become stiff and he be-
14 lieves said injury is permanent; that as a proximate result of said injury, he has lost the use of muscular power of his left arm and hand, and said hand and arm have become useless so far as the performance of any labor is concerned, and believes said injury is permanent; that as a proximate result of said injury, he has suffered a severe nervous shock, and has suffered great anguish of body and mind and will continue to always so suffer.

Plaintiff says that at the time of the incurrence of said injury, he was a man of good sound physical health, being thirty-five years of age, and was able to earn and did earn about One Hundred and twenty ($120.00) dollars per month, and by reason of his said injuries, caused by the negligence of the defendant as aforesaid, he has been, and is totally and permanently disabled for the performance of manual labor, and by reason of the premises has been damaged in the sum of Thirty Thousand ($30,000.00) dollars.

Wherefore, plaintiff prays judgment against the defendant for the sum of Thirty Thousand ($30,000.00) dollars, together with his costs.

W. R. STEWART,
Attorney for Plaintiff.

(Verification and precipe omitted.)

In the Court of Common Pleas.

Demurrer.

(Filed Aug. 5, 1911.)

Now comes Erie Railroad Company, defendant in the above entitled action, and files this, its demurrer to the petition of
15 plaintiff herein, and for ground therefor says that said petition does not state facts sufficient to constitute a cause of action against this defendant.

HINE, KENNEDY & MANCHESTER,
Attorneys for Defendant.

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Court of Common Pleas.

Answer.

(Filed Sept. 22, 1911.)

Now comes Erie Railroad Company, defendant above named, and, by leave of court first had and obtained, files this its answer to the petition of plaintiff herein, and says: it admits that it is a corporation, engaged in the operation of a line of railroad passing through the City of Youngstown, Ohio, and that in connection therewith there now are, and were at all the times in said petition stated, railroad yards and sidings in connection therewith. Further answering, defendant admits that on or about the 7th day of March, 1911, plaintiff was in its employ as a yard conductor, at the yards of this defendant at Moser, and while at said yards he sustained certain injuries to his left arm, by reason of falling in such a manner that his left arm was thrown beneath a moving locomotive, but defendant denies that said injuries are of the nature, character or extent as in said petition described, and denies that they were produced by the causes therein set forth; and further answering defendant denies each and every allegation, statement and averment in said petition contained, except as hereinbefore expressly admitted to be true.

Further answering defendant says that if it was in any manner guilty of negligence in the premises, then plaintiff himself
16 was guilty of negligence, inattention and lack of care directly contributing to produce said accident and injuries, in failing to keep a proper lookout; in failing to exercise his senses; in failing to look and observe where and how he was going and where he was stepping, and in carelessly stepping and falling in such place and manner that he could be injured, as aforesaid.

Further answering, defendant says that it is in no manner liable to plaintiff, and having fully answered prays that it may be dismissed hence with its costs.

HINE, KENNEDY & MANCHESTER,
Attorneys for Defendant.

(Duly verified.)

Court of Common Pleas.

Reply.

(Filed Nov. 7, 1911.)

Plaintiff, for his reply to the answer of the defendant filed herein, says, he denies that he was guilty of negligence, inattention and lack of care, directly contributing to produce said accident and injuries. That his injuries were caused by the negligence of the defendant and the defective condition of its switching appliances in that the pulley wheel and wires were permitted to be left uncovered as in his petition alleged.

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Further replying this plaintiff denies each and every averment and allegation in defendant's answer contained as a matter of defense to his petition filed herein.

17 Wherefore, plaintiff prays as prayed for in his petition.

W. R. STEWART,
Attorney for Plaintiff.

(Duly verified.)

Court of Common Pleas.

Motion for New Trial.

(Filed Nov. 25, 1911.)

Now comes Erie Railroad Company, defendant in the above entitled action, and moves the court for an order to set aside and vacate the verdict of the jury returned herein, and to grant it a new trial herein for each and all of the following causes affecting materially its substantial rights.

First. That the court erred in overruling the demurrer of defendant to the petition of plaintiff in this case.

Second. Irregularity in the proceedings of the court by which defendant was prevented from having a fair trial.

Third. That the verdict is not sustained by sufficient evidence, but is against the manifest weight of the evidence.

Fourth. That the verdict is contrary to law.

Fifth. That the court erred in admitting incompetent evidence offered by plaintiff against and over the objection of the defendant.

Sixth. That the court erred in refusing and excluding competent evidence offered by the defendant.

Seventh. That the court erred in refusing to charge the jury, as requested in writing by the defendant before argument.

18 Eighth. That the court erred in refusing to direct a verdict for the defendant at the conclusion of plaintiff's testimony.

Ninth. That the court erred in refusing a verdict for the defendant at the conclusion of all the testimony in the case.

Tenth. That the court erred in its general charge to the jury.

Eleventh. That the verdict is against the right, privilege and immunity especially set apart and claimed by the defendant under the Constitution, Statutes and laws of the United States.

Twelfth. That the court erred in refusing to apply the laws of the United States to the situation of the parties in this action, in this, to-wit: That defendant claimed a right, privilege and immunity from liability upon the ground and for the reason that a certain Federal Statute, namely, that act commonly known as the Employers' Liability Act of Congress of April 22nd, 1908, applies to the situation of the parties to the exclusion of any and all legislation of the State of Ohio upon the same subject, and that under the provisions of said Act, plaintiff assumed the risks incident to the situation whereof he complained, providing he knew or ought to have known

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of the same; that said claim of defendant was denied by the court, and is denied by the verdict herein complained of, and the decision is against the right, privilege and immunity so especially set apart and claimed by defendant, as aforesaid.

Thirteenth. That the defendant was denied the protection of the law of the United States, and said verdict and decision is against its rights claimed thereunder.

19 Fourteenth. Other error of law occurring at the trial, excepted to by the defendant, and appearing upon the record.

HINE, KENNEDY & MANCHESTER,
Attorneys for Defendant.

Court of Common Pleas.

Docket Entries.

May, 1911.

May 4th, 1911. Petition and precipe filed. Summons issued.

May 15, 1911. Summons returned and filed endorsed: Received this writ, May 6th, A. D. 1911, and pursuant to its command on the 8th day of May, A. D. 1911, I notified within named defendant, Erie Railroad Company, by delivering to G. D. Hughes, a regular ticket agent for said defendant company, at Youngstown, Ohio, a true and certified copy thereof with the endorsements thereon, after having made diligent search for and being unable to find the President, Secretary, Treasurer, Clerk or any other chief officer of said defendant company, within said county. George W. Turner, Sheriff, A. L. Bell, Deputy. Fees $1.75.

Aug. 1st, 1911. Leave to answer by Aug. 5th. J. 103B, page 294.

Aug. 5th, 1911. Demurrer and Brief filed.

Sept. 12th, 1911. Demurrer overruled. Deft. excepts and has leave to answer by Sept. 23rd, 1911. Points reserved for trial. J. 104A, page 32.

Sept. 22nd, 1911. Answer filed.

Nov. 7th, 1911. Leave to reply instanter. J. 104B, page 115.

20 Nov. 7th, 1911. Reply filed.

Nov. 20th, 1911. On trial to Jury; Jury sworn, etc. J. 104B, page 151.

Nov. 21st, 1911. On trial to Jury; Trial continued. J. 104B, page 154.

Nov. 22nd, 1911. On trial to Jury; Trial continued. J. 104B, page 155.

Nov. 23rd, 1911. On trial to Jury; Verdict for Pl'ff vs. def't for $5,000.00. J. 104B, page 157.

Nov. 23rd, 1911. Verdict filed.

Nov. 25th, 1911. Motion for new trial filed.

Dec. 5th, 1911. Motion for new trial overruled. Def't excepts. Judgment on verdict for Pl'ff vs. Def't for $5,000.00 and costs. Def't excepts and is allowed 40 days in which to prepare and file Bill of Exceptions. J. 104B, page 200.

Jan. 13, 1912. Bill of Exceptions filed.

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Jan. 25, 1912. Bill of Exceptions transmitted to Hon. Geo. F. Robinson, Trial Judge.

Jan. 25, 1911. Bill of Exceptions received again by the Clerk and filed.

Journal Entries.

J. 103B, Page 294, May Term, A. D. 1911, to-wit: Aug. 1st.

Defendant has leave to answer by August 5th.

J. 104A, Page 32, Sept. Term, A. D. 1911, to-wit: Sept. 12th.

This day this cause comes on for hearing upon the demurrer of the defendant to the petition filed herein.

21 On consideration thereof the court overrules the same. Defendant excepts and has leave to answer by Sept. 23rd. Points reserved for trial.

J. 104B, Page 115, Sept. Term, A. D. 1911, to-wit: Nov. 7th.

Plaintiff has leave to reply instanter.

J. 104B, Page 151, Sept. Term, A. D. 1911, to-wit: Nov. 20th.

This day come the parties by their attorneys; also come the following named persons as jurors, to-wit:

1, J. F. Gillen; 2, J. W. Kuhns; 3, W. J. Ellis, 4, John Sass; 5, J. B. Faulds; 6, Ed Gleckler; 7, Frank Mackey; 8, L. B. Arkwright; 9, Homer Slagle; 10, C. Walters; 11, R. L. Walker; 12, L. Rayen; who were duly impaneled and sworn according to law, and the trial proceeded. And the jury having heard the evidence in part, court adjourns the further consideration of this cause until 8:30 A. M. to-morrow, until which time said jury is hereby excused under instructions of court.

J. 104B, Page 154, Sept. Term, A. D. 1911, to-wit: Nov. 21st.

This day come the parties by their attorneys; also come the jury heretofore impaneled and sworn and the trial proceeded, and the jury having heard the remainder of the evidence, arguments of counsel and charge of the court retire to their room for deliberation, and the hour of adjournment having arrived and said jury not having as yet agreed upon verdict they are by the court excused until 8:30 A. M. tomorrow.

J. 104B, Page 155, Sept. Term, A. D. 1911, to-wit: Nov. 22nd.

22 This day come the parties by their attorneys; also come the jury heretofore impaneled and sworn, who retire to their room in custody of the sheriff for further deliberation, and the hour of adjournment having arrived and said jury not having as yet agreed upon a verdict they are by the court excused until 8:30 A. M., tomorrow.

J. 104B, Page 157, Sept. Term, A. D. 1911, to-wit: Nov. 23rd.

This day come the parties by their attorneys; also come the jury heretofore impaneled and sworn, who retire to their room in custody of the sheriff for further deliberation, and after due deliberation return into open court and report their verdict in writing signed by their foreman, to-wit:

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We, the jury in the above entitled cause find the issues joined by the pleadings for the plaintiff and assess his damages at Five Thousand dollars.

JOHN W. KUHNS, *Foreman.*

$5,000.00.

J. 104B, Page 200, Sept. Term, A. D. 1911, to-wit: Dec. 5th.

This day this cause comes on for hearing upon the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and grant a new trial.

On consideration thereof the court overrules the same. Defendant excepts.

It is therefore considered by the court that the plaintiff recover from the defendant the said sum of Five Thousand Dollars, the amount *of* the jury heretofore found due together with his costs herein expended, and the defendant pay its own costs.

23 To all of which the defendant by its counsel duly excepts and is allowed 40 days from and after this date in which to prepare and file its Bill of Exceptions herein, which when so prepared and filed shall be part of the record herein but not be recorded.

(Duly certified.)

Court of Common Pleas.

Bill of Exceptions.

Be It Remembered, that at the trial of the above entitled cause, at the September term of the Court of Common Pleas, Mahoning County, Ohio, to-wit: beginning on the 20th day of November, 1911, and continuing from day to day thereafter as hereinafter noted, before the Honorable George F. Robinson and a jury of twelve men, the above appearances being made on behalf of the parties, the plaintiff, to maintain the issues on his part to be maintained called the following witnesses and introduced the following evidence, to-wit:

Dr. J. B. KOTHEIMER, being first duly sworn, testified as follows:

Direct examination.

By Mr. STEWART:

Q. Your name please?
A. Kotheimer.
Q. Jno. B. Kotheimer?
A. Yes, sir.
Q. Doctor, you are a physician and surgeon?
A. Yes, sir.

24 Q. Been practicing medicine in this city how long?
A. Twenty-seven years.

Q. During that time have you had any special practice as an examining surgeon for the United States Government?
A. Yes, sir.
Q. How long?

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A. Eighteen years.

Q. In that experience have you had occasion to examine many fractures and injuries and different joints and the like?

A. I have, yes, sir.

Q. I will ask you whether you ever examined the plaintiff here?

A. I have.

Q. When?

A. This morning.

Q. Did you examine his left arm?

A. I did.

Q. What if anything, doctor, did you find in that left arm indicating an injury?

A. I found the left arm injured involving the structures from the elbow and more or less forearm to the fingers, including the fingers. The bones making up the elbow joint have been crushed into numerous pieces. The healing up of the same and uniting of those pieces left the arm, left the elbow joint stiff and immovable. The scars around the elbow joint and forearm and fingers indicate that the forearm had been lacerated severely. I further find that one of the bones, the radius of the forearm, was fractured about half way between the elbow and wrist joint. I found the distal joint of the second finger of the left hand amputated. I found scars on the third and fourth finger. The third finger and the fourth finger are crooked. The third one more so than the fourth and some of the joints of the third finger are immovable also, that is ankylosed. I find that the measurement of the forearm near the seat of injury, that is near the elbow, is larger in circumference than the sound arm to the extent of one inch. The left arm by reason of the immovability of the elbow joint cannot be bent any further than to about.—or is bent naturally, or rather by injury, to an angle of about 110 to 120 degrees; therefore he cannot use the arm for a good many purposes which a sound arm could be used for. I think that is about all.

Q. Let me ask you, doctor, about the thumb of the hand,—do you remember of the thumb, of the bones of the thumb being dislocated?

A. I must say that I did not pay particular attention to the thumb when I examined the man.

Q. Mr. Welsh, will you just come forward here and let the doctor see your thumb?

A. (Doctor examines thumb.)

Q. Now, doctor, in what condition do you find that thumb?

A. I find that the proximal joint of the thumb is dislocated.

Q. Which joint is that?

A. Nearest to the hand.

Q. Which way does the bone go in that dislocation, doctor, toward the ball of the hand or outside?

A. Towards the ball of the hand, throwing the thumb back.

Q. I will ask you, doctor, whether or not in addition to what you stated whether or not the fingers are misshapen or drawn out of place or did you cover that?

A. I did cover that, they are.

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Q. Which way, downward or upward?
A. The hand is drawn downward to some extent.
Q. I will ask you doctor, whether that stiffness that you speak of in the joint here, bending the arm into a certain angle,
26 whether or not that stiffness is permanent?
A. That is permanent.
Q. What would you consider this injury, such as this arm is afflicted with in both elbow, forearm and hand, equivalent to?

Defendant objected.

Q. I will ask you whether or not this left arm of his in the condition which you now find it and which you think it will be in the future, will ever be fit to use in the performance of manual labor?
A. It will not be, the left arm.

"That's all."

Mr. STEWART: If the court please I have some photographs of this injury, but they were taken by Dr. Montgomery and he is confined to his room.
COURT: What do you mean, X-Rays?
Mr. STEWART: Yes. Well, I don't care. I may not need to use them.
Mr. STEWART: If the court please we have agreed that "Plaintiff's Exhibit A" which constitutes a photograph or a view of the place where the accident occurred shall be admitted as evidence, and also that "Plaintiff's Exhibit B" shall be admitted as evidence.
Mr. STEWART: I want to say to the jury that "Plaintiff's Exhibit A" was taken with the camera set east of the scene of the accident and looking westward; the condition is reversed in "Ex-
27 hibit B," the camera being set west of the scene of the accident looking eastward.

"That's all."

Plaintiff then called as a witness to testify in his behalf C. A. LIDLE, who being first duly sworn, testified as follows:

Direct examination.

By Mr. STEWART:

Q. Your name is C. A. Lidle?
A. Yes, sir.
Q. Where do you live, Mr. Lidle?
A. 1015 Hillman Street.
Q. How long have you lived in Youngstown?
A. Probably 35 years.
Q. What is your occupation?
A. Yard brakeman.
Q. Where?
A. Erie.
Q. That is on the Erie lines?
A. On the Erie lines in the city.

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Q. City of Youngstown?
A. Yes, sir.
Q. How long have you been in the railroad service?
A. Twenty-five years last September.
Q. As a brakeman or an employe of the Erie did you ever work in the yards up here at Mosier known as the Brier Hill yards or about there?
A. Yes, sir.
Q. How long ago?
A. I think it will be eight years last June.
Q. And do you remember as a fact as to whether the interlocking used at that point where you enter the yard from the east was ever boxed over or not?

28 Defendant objected; sustained.
Mr. STEWART: I will withdraw that question.

Q. Have you noticed the system they have up there—the system shown in that photograph as an interlocking system and wires running across here, and looking westward, here is your camera up here, looking up the track?
A. I have been up there twice in the past eight years, but I have not observed any of that work.
Q. Has your company interlocking devices such as are shown upon this photograph at any other place except in the Brier Hill yards?
A. Yes, sir, there is what we call the middle yard, a branch of the Sharon line and P. & L. E. have interlocking.
Q. Do you work about that yard now?
A. Yes, sir.
Q. For how long have you been working about that yard?
A. Probably in the neighborhood of six or seven years.
Q. I will ask you whether or not when those interlocking devices were installed on the line whether or not they were boxed in?

Defendant objected; sustained.

Q. I will ask you whether any of the interlocking devices down in the yard where you work on the Erie are installed as this one is with pulley, levers, wires, and operated by a lever in the tower, such as the one is in the Brier Hill yards?
A. Yes, sir.
Q. I will ask you now whether those interlocking devices at the time of their installation were covered or boxed in.

29 Defendant objected.

A. Yes, sir.

COURT: I will permit the question to be answered—but now which part of the device do you mean?

Q. Were the pulley and wires corresponding to these that I have shown you in picture marked "Exhibit A" covered at the time of their installation?

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Defendant objected; overruled; defendant excepted.

Q. The pulley being in the center of the track, Mr. Lidle, the wire runs at right angles to the pulley and then the direction is changed by the pulley so as to parallel the track with the wire, now was this device referred to here as pulley and the wires in connection with it covered when this installation was made?

Defendant objected; overruled; defendant excepted.

A. The device in the middle yard that I refer to wasn't made like this.

Q. Well were there any devices in that yard similar to the device shown in picture marked "Exhibit A" in having pulley and wires along the track on the runway?

A. Not in between the tracks, alongside of the tracks.

Q. Was this place alongside of the track used as a runway by the men?

A. It couldn't be because it was boxed at that time.

Q. When was this device, that is the pulley and the wire that was strung along the track, was that boxed in?

Defendant objected; overruled; defendant excepted.

A. At the time it was installed.

Mr. KENNEDY: We ask that the evidence be taken from the jury.

Overruled; defendant excepted.

Cross-examination.

By Mr. KENNEDY:

Q. Mr. Lidle where is this interlocking plant you were speaking to Mr. Stewart about?

A. The one that we call the middle yard—it is at Watt and the Pollock Boiler works.

Q. Are the wires and pulleys of that interlocking plant covered or boxed in now?

A. No, sir.

Q. As a matter of fact they haven't been for a great many years?

A. Quite a few years—it kind of drifted away or dwindled away.

Q. They are not boxing them now?

A. There is no boxing down there except what runs underneath the tracks in pipes.

Q. But the wires that Mr. Stewart spoke about are not boxed?

A. No, sir.

Q. They have not been for a great many years?

A. Some years, yes, sir.

That's all.

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Plaintiff then called as a witness to testify in his behalf JOHN WALDRON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. STEWART:

Q. What is your name, Mr. Waldron?
A. John Waldron.
Q. You are a railroad man, Mr. Waldron?
A. Yes, sir.
31 Q. How long have you been a railroad man?
A. Going on twenty-five years.
Q. During that time has your work on the railroad been that of trainman most of the time?
A. All of the time.
Q. Where do you work now?
A. Erie yards, Youngstown.
Q. How long?
A. Going on twenty-one years, I think.
Q. Mr. Waldron, I hand you a picture marked "Exhibit A" and call your attention to a pulley in the center or between the two tracks connected with a system of wires and will ask you whether or not you know of an arrangement similar to that in construction along the lines of the Erie railroad where you work?
A. No, sir, I don't; not like that.
Q. Do you know of any with a construction with the pulley wheel and wires? No difference where located?
A. Yes, sir, I have seen the pulley wheel and wires used to the targets for use in dropping the block; they are generally alongside of the track and not in the middle of the track. In fact, I never saw them in the middle of the track.
Q. You never saw them between the two tracks?
A. Those I suppose represent the ones at Mosiers?
Q. Yes.
A. Now, if they are there I never noticed them, although I passed them a great many times, but my eyes was on the paddles and I wasn't watching the mechanism of them.
Q. Then in working through that yard and going through there you get your signal by a paddle?
A. Yes, sir.
32 Q. Where is that?
A. At the east end of the yard there is a semi-phore there. There is two blades—the lower blade that you enter the yard when it is dropped; the upper one is set——
Q. I will ask you as to the location of these paddles as to whether they are high or law?
A. They are high on a post, but in leaving the yard there is what we call a dwarf signal that governs a cross-over leading from the yard onto the main tracks, heading east.
Q. You are now, are you, speaking of the Brier Hill yards, the scene of this accident?
A. Yes, sir.

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Q. Now this dwarf signal is on the north side of the track?
A. From the main track, you mean?
Q. Yes?
A. Yes.
Q. And the dwarf signal is not so high as the other signals that are put on posts?
A. No, sir, it is close to the ground, about that high, three or less feet.
Q. Then in going into the yard and out of the yard what is the custom of railroad men as to watching signals?
A. As to watching signals?
Q. Yes, what is the custom?

Defendant objected; sustained.

Mr. STEWART: I will withdraw the question.

Q. Now referring to this pulley and wires connected with it which you speak of as being in the yard where you work, I will ask you whether or not that was installed with a cover or some protection?

Defendant objected; overruled; defendant excepted.

A. The place that I refer to is what we call Himrod tower, south of Watt Street. There is wires running to the semi-phore
33 blade and that is the only place that I know of where the wires are used. They run alongside of the track north and south. The rest is a series of piping connected up with the various rails and at the time they were put in, at least the time I remember having used them, previous to the reinstallation of new piping they were covered until they were worn away with picking and one thing and another they weren't kept up.

Defendant moved the court to strike out the answer; overruled; defendant excepted.

Cross-examination.

By Mr. MANCHESTER:

Q. Mr. Waldron, you speak of an interlocking system at Watt Street?
A. South of Watt Street.
Q. Is that anything similar to this system at Mosier yard?
A. Why I don't know. I am not familiar with the system in Mosier.
Q. Well, now take this system at Watt Street, there are no boxes or covers over the wire now?
A. Except in one place where they go into the tower.
Q. But where they go along the side of the track?
A. No boxing whatever.
Q. And there hasn't been any there for a great many years?
A. Well, it hasn't been there since the new tubing was put in.
Q. How long ago was that?
A. I couldn't say because while I passed up and down there every day I didn't pay any attention to it.

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34 Q. Well, was it a number of years?
A. Yes, sir, a number of years, that is a sure thing.
Q. And the wires run outside of the track?
A. Yes, sir, they are connected up with the semi-phore blades.
Q. Do any of them run between the tracks, some of them do, do they not, I mean parallel with the track?
A. Parallel with the tracks, yes, sir.
Q. And between the tracks?
A. Between the tracks I don't believe there is any wires. I think it is all tubing.
Q. But you wouldn't be sure?
A. No, I wouldn't be sure of that, but I don't think there is.
Q. Are you a yard switchman?
A. Yes, sir.
Q. What yard do you work in?
A. In the lower yard.
Q. Whereabouts is that?
A. That is down *down* what we call between the Lake Shore and Haselton—between the Lake Shore depot and Haselton.
Q. You don't work in the Mosier yard?
A. Sometimes when we are sent up for a draft.
Q. You don't get up there very frequently?
A. Not very often.
Q. When you take a drag up there, I presume all you do is to uncouple your engine and leave the drag stand without distributing your cars?
A. We generally have to distribute our cars, but we go into the yard and get our orders from the yardmaster where to put the cars, but we hardly ever stop at this end unless we are held by the block.
Q. You don't stop there by the yard office at all?
A. Only for orders.
35 Q. And that doesn't happen very frequently?
A. Oh, we have to stop for orders.
Q. But your regular work?
A. Our regular work is down below at N. K. yards.
Q. Who gets the orders, that is where to put the cars?
A. The conductor.
Q. He always does that?
A. I wouldn't say he always, it is his duty.
Q. You don't do it yourself?
A. Not unless I happen to be handy; it is the conductor's place to get them.
Q. Then when you take a drag of cars down to the other yard you couple your engine onto it up there and haul it down?
A. Yes, sir, sometimes we make a couple—sometimes you have to switch your cars out but generally we get them in bulk and all we have to do is to couple on and go.

Redirect examination.

By Mr. STEWART:

Q. And in the discharge of your duty up in that yard you say

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you don't remember of ever having seen this pulley wheel and wires up in that yard?

Defendant objected; sustained.

Q. In answer to a question put by Mr. Manchester you said something about tubing—wires running through tubing?
A. No, I said "no wires, but tubing"—tubing instead of wires.

"That's all."

Plaintiff then called as a witness to testify in his behalf
36 D. P. CONWAY, who being first duly sworn, testified as follows:

Direct examination.

By Mr. STEWART:

Q. Your name is D. P. Conway?
A. Yes, sir.
Q. Mr. Conway, you were formerly a railroad man?
A. Yes, sir.
Q. Where were you employed?
A. The Erie.
Q. Where was your last work for the Erie done?
A. Brier Hill yards.
Q. When was that?
A. 26th of November, 1905.
Q. That is when you ceased railroading?
A. Yes, sir.
Q. Mr. Conway, I hand you a picture, a photograph marked "Exhibit A" and ask you whether or not that is a photograph of the yards as they were constructed, that is the entrance to the yards were constructed when you last worked there?
A. Yes, sir.
Q. I will ask you whether or not this interlocking device such as you see in this picture had been installed before you left the service?
A. Yes, sir, when I entered the service there was an old plant there.
Q. How about the one pictured here?
A. That is as it existed when I left the service.
Q. I will ask you whether or not the device as it now appears to you in this photograph and when you were employed there was covered at any time or uncovered?

Defendant objected; overruled; defendant excepted.

37 A. The old plant was covered, but the new plant wasn't.
Q. Did the old plant contain a pulley and wires in the center of the track such as you see here in picture marked "Exhibit A?"
A. Yes, this is what you have reference to here, the chain?
Q. Yes?
A. Yes, sir.

Q. Do you observe in this picture there are two wires running diagonally across the runway between the east and west bound track?
A. I see them there, yes, sir.
Q. Do you know where those wires started and where they ended?
A. Yes, sir.
Q. Where?
A. They start from the tower where the mechanism is operated and run to a dwarf signal north of the west bound main track—that is next to the sidetrack known as the lead track where the yard crews switch, immediately north of that along the sidetrack.
Q. So that it runs then diagonally across the railroad tracks?
A. Yes, sir.
Q. At right angles?
A. Yes, sir.
Q. Do you remember of that installation of wires there while you worked there?
A. I couldn't just recall the time but when I entered the service of the Erie they had an old plant there.
Q. Did they have a dwarf signal across on the other side?
A. I never remember of that dwarf signal there; only with the exception of the one that was up further in the yard governing the switch leading from the yard out onto the westbound track.
38 Q. I take it from that that you have no recollection of these wires running directly across or under the tracks to the dwarf signal while you worked there?
A. No, sir.
Q. Mr. Conway, I will ask you what this space is called between the east and westbound track in the center of which you see the pulley wheels in this picture marked "Exhibit A"?
A. A runway.
Q. I will ask you whether or not that runway is used frequently by employes and whether they are in the habit of using it in discharging their duty to the company?
A. They always have to use it.
Q. I will ask you whether a contrivance like the pulley wheel we have described and the wires being strung directly across this runway whether that has anything to do with the safety or security of that runway?

Defendant objected; sustained.
Mr. STEWART: I will withdraw that question.

Cross-examination.

By Mr. MANCHESTER:

Q. Mr. Conway you left the service in 1905?
A. Yes, sir.
Q. This new interlocking system you speak of was installed just about that time, wasn't it, in 1905?
A. I couldn't say definitely; it was there when I was last in the service of the company.

POOR C

Q. And you say those wires were never covered on this new system?

A. Not on the new system, no sir.

39 COURT: How far above the surface of the ground were these wires, those that show in the picture there?

A. Perhaps four to six inches, there is a pulley wheel there and the two or three sheaves on the pulley wheel and the top wires would be about six inches from the ground—the pulley wheel sets on a block. The block would be about an inch above the ground and the top wire six or eight inches above the ground.

Q. You are referring now to the wires that are parallel with the track and between the east and west track?

A. Yes, sir.

Q. Not at right angles or across the track?

A. I have reference to the ones at that pulley wheel between the east and westbound main track.

Q. They run parallel with the track?

A. Well, both ways. They run around the pulley wheels and then parallel with the track; that is coming from the operating tower they run in under the track to the pulley and then parallel to the track.

Q. Mr. Conway, do you remember how far east of the yard office that interlocking plant is located?

A. The present one?

Q. Yes?

A. They have now a new yard office there.

Q. Well, I refer to the one that is shown here in this picture?

A. The west end of it or east end, west end of the plant?

Q. The east end of the plant?

A. Well, the wires and mechanism between the east and westbound track are perhaps thirty or thirty-five feet long, that

40 is from the east to the west point and that is about ten feet east of the office as it is now, that is my recollection.

Q. This photograph marked "Exhibit A" perhaps would help you in it?

A. That would be hard to distinguish whether that was directly across from the west end of the plant or not.

Q. By following the piping or tubing which leads off to the side can you tell?

A. That might be ten feet and it might be a foot.

Q. Well, I was just wondering if you were able to recall the distance?

A. Not from that photograph, only from my recollection.

Q. Well from your own recollection?

A. As I described it.

Q. These wires which run at right angles to the tracks pass underneath the rails and alongside of the ties, do they not, as shown in the photograph?

A. Yes, sir, between the ties and underneath the rails, yes sir.

"That's all."

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Q. I just asked you where you stepped?
A. Onto a wheel.
44 Q. Now I will ask you if the wheel you stepped on was located at the place where you see this wheel in the picture marked "Exhibit A"?
A. Yes, sir.
Q. The most easterly wheel, that is this wheel?
A. East of the interlocking.
Q. When you stepped on that what happened?
A. Turned around and threw me into the wires which my feet caught and tripped me under the engine.
Q. I will ask you which wires caught your feet?
A. Those two wires that runs horizontally with the east and west bound track.
Q. You don't mean horizontally, you mean right angles, across?
A. Direct across the track.
Q. You mean the wires running at right angles with the track?
A. Opposite the way the track runs; the track runs east and west and they run north and south.
Q. Were those wires that you speak of the wires that ran completely across the track and were connected with the dwarf signal?
A. Sir?
Q. Were those wires which tripped you as you say and ran across the track, were those the wires that ran from the tower across the track northward to the dwarf signal?
A. Yes, sir.
Q. About how far were they above the ground at that place where your feet were caught?
A. Two or two and one-half inches.
A. What kind of wires were they as to size?
A. Small dark telephone wires.
Q. How many of them?
A. Two.
45 Q. Now I will ask you what was the condition of the weather that night?
A. Snowing and blowing and the snow was about two and a half or three inches deep.
Q. What kind of snow was it, light or wet, heavy snow?
A. Wet, heavy snow.
Q. I will ask you what were the conditions here where you stepped of- about these wires, interlocking, as to being covered with snow or otherwise?
A. Well, this wheel and everything there, the snow killed my view of everything, interlocking, and everything there. I supposed I was getting off far enough east of the interlocking to avoid getting off in this trap, which I got off in this trap, which threw me under the wires and threw me under the engine.
Q. You thought you were getting off east of this pulley?
A. Yes, sir.
Q. Had you ever observed these small wires before?
A. No, sir.

POOR C

Q. But you had observed the pulley had you?
A. No, sir.
Q. I mean the pulley wheel?
A. No, sir.
Q. Well had you observed it up further than that, that is knew it was there?
A. No, sir, I have seen pulley wheels and wires along the track, but I never seen or had any recollection of seeing the wires there or that pulley wheel.
Q. That is you didn't know just where it was located?
A. Didn't know where it was located at.
Q. You knew there was one located near the office there?

46 Defendant objected; overruled; defendant excepted.

A. I knew there were interlocking there at the office.
Q. That is what you were trying to escape when you got off where you did?
A. Yes, sir.

Defendant objected; overruled; defendant excepted.
COURT: It is a very objectionable form.
Mr. STEWART: I will withdraw it, the question is answered.

Q. When you got off the locomotive at that point where you did, did you know that you were stepping on any part of this interlocking or about to step upon it?
A. No, sir.
Q. Could you see it at that time, concealed as it was by the snow as you said?
A. No, sir.
Q. Could you see the wires?
A. No, sir.
Q. I believe you said this was about eleven P. M.?
A. Yes, sir.
Q. And how was it as to being a light or dark night?
A. It was a dark and snowing and blowing, a blinding snowstorm.
Q. When your feet were caught under the wire were you able to extricate them in time to get out of injury?

Defendant objected; sustained.
COURT: Let him tell what occurred.

A. When I got off of the engine I got off on this pulley wheel which turned with me and threw me into the wires and the wires
47 when I was falling, struggling, the wires were caught in my shoe, and caught in those eyelets, and held me and pulled me under the engine,—pulled me sideways, when I went like that, pulled me like this and threw me sideways like this with my arm right under the engine, helpless.
Q. Where did you light with reference to the engine,—which wheel went over you?

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A. I couldn't say what wheel; it was so quick and so fast that I tried to paw myself out, I couldn't tell.

Q. Was it in the machinery of the engine?

A. I was thrown right in the engine; I don't know whether it was the machinery or wheels or what.

Q. Were you thrown under?

A. I was thrown right under the engine; of course this arm, I can mind of this arm being right over one of the connecting rods and that is what held me and that is what pulled me.

Q. You don't know what broke your arm, whether it was the wheel or some machinery?

A. I don't know.

Q. Did you go clear down?

A. Yes, sir, right down in that form, right down on my back of course I would have been killed the way I lit with my head only I got up with this arm on the connecting rod when it came down and it just mangled this arm; I rolled out to one side like that.

Q. During the time you were in that yard, Mr. Welsh, did you work nights or days?

A. I mostly worked nights.

Q. Did you ever work days?

A. Yes, sir.

Q. How long?

A. A few weeks I worked days; a few weeks,—six or eight weeks.

Q. How long ago?

A. Oh, it is a good while ago.

Q. About how long?

A. Well a year, you see I worked in the lower yard. I
48 have worked on the branch, I have worked in the Ohio Steel plant yard and F. D. yard and all the yards in Youngstown. I didn't put all my time in Brier Hill yard.

Q. How much time did you put in the Brier Hill yard in the day time while you were working?

A. I would say altogether off and on in the twelve years I was on the railroad about four months altogether.

Q. And was that time distributed over several years or four months one month right after the other?

A. That was off and on, several years, that is in day time.

Q. That is what I mean, in day time, did you ever know, Mr. Welsh, whether this interlocking was boxed or not?

A. No, sir.

Q. You don't remember?

A. No, sir. I remember when there used to be boxing there; it used to be boxed, the wires; and there was a footwalk between the track clean over north to the east lead, right up, and it was all boxed over, boxing on this switch. Show me the picture and I can show you the boxing up again- the track; there used to be boxing there; they used to take them off and oil them.

Q. Do you know whether that was when they had the present interlocking system that they have there now at that place?

A. No, sir.

Q. That was before this was installed?
A. Before that was installed, yes, sir.
Q. Do you know whether the present system was ever boxed in or not?
A. No, sir.
Q. You don't know whether it was or not?
A. No, sir.
49 Q. Have you been able to work any, Mr. Welsh, since your injury?
A. No, sir, no person wants to employ a man——
Defendant objected.
Q. I just want to know whether you have been able to work any?
A. No, sir.
Q. You were injured last March, about the 7th?
A. 7th of March.
Q. And have you been able to work any?
A. No, sir.
Q. Have you been able at any time since you were injured to dress and undress yourself?
A. No, sir.
Q. How is it at the table in eating and cutting your meat or anything that needs to be cut with a knife and fork?
A. Cutting my meat or anything like that my wife has got to do it,—butter my bread.
COURT: How much use have you of your hand, I don't mean of your arm but your hand?
A. Why you see I haven't got much use of it; I can't hold anything, no power.
Q. Can you cramp your fingers so that you can touch the ball of your hand with them?
A. No, sir.
Q. Have you any grip at all with your hand?
A. Why no, I can show you the grip I have got; I haven't got much grip.
Q. Can you move your elbow at all?
A. No, sir, (indicating).
Q. I will ask you whether or not your arm bothers you any as to pain?
A. Yes, sir, at night it always bothers me. I have got to
50 lay most of the time on my back and lay my arm on a pillow. Now last night it was awful,—pained all night. I have got to get up some time at night and soak my arm and hand in a basin of hot water.
Q. At the time you were injured how much were you earning per month?
A. Oh, between one hundred and one hundred and twenty.
Q. I believe you men are paid by the month?
A. No, sir, by the hour.
Q. I mean you get your pay every month?
A. Yes, sir.

R COPY

Q. Knowing the requirements of a railroad man, if your arm remains in the condition it is will you ever be able to railroad any more?

A. No, sir.

Cross-examination.

By Mr. KENNEDY:

Q. Mr. Welsh, you say you are about thirty-six years old?

A. Yes, sir.

Q. And had been in the service of the Erie road for about fourteen years?

A. About that.

Q. And the first four years of the service you worked in and about Youngstown?

A. Yes, sir.

Q. In the yards here?

A. No, sir.

Q. What did you have, a yard run?

A. I worked in the upper mill and I used to be chief engineer at the Republic Iron & Steel Company for eleven months and I worked in the mills.

Q. I spoke about your railroad service.

A. That is all the railroad service that you see there is what I — telling you of the Erie Railroad Company.

51 Q. You worked in the mills?

A. Before I worked on the Erie.

Q. Well I am speaking now of the time you were in the Erie service, the first four years as I understood you to say, you were a brakeman?

A. Yes, sir.

Q. Now while you were brakeman where did you render your services to the road, in Youngstown?

A. In Youngstown yards.

Q. What yards particularly?

A. All the yards; I worked in them all.

Q. Worked in the upper yard; Brier Hill yard; and what is called the Himrod yard?

A. Yes, sir, and Valley yard and Ohio Steel yard.

Q. And the last ten or eleven years you have been working as conductor, yard conductor?

A. Yes, sir.

Q. Now as yard conductor your services required you to be in and about the various yards in and about Youngstown?

A. Yes, sir.

Q. That service of course was performed both day and night, that is you worked part of the time days and part of the time nights?

A. Yes, sir.

Q. About what proportion of the ten or twelve years did you work days?

A. In Brier Hill yard about four months.

Q. And about what proportion of that time did you work nights in the Brier Hill yard?
A. About three or four years.
Q. What is the length of that yard at Brier Hill?
A. Oh, about a mile.
Q. And for three or four years you worked there every night?
A. Yes, sir.
52 Q. And about how many movements of your engine would you make per night in that yard?
A. Well that would be hard to tell, a good many.
Q. Well on an average?
A. Oh, I couldn't give you any estimation.
Q. Forty or fifty?
A. Oh, yes, more than that.
Q. One hundred?
A. Oh, yes.
Q. Moved up and down those tracks more than a hundred times per night for three or four years?
A. Yes, sir.
Q. Was this yardmaster's office always at the same place?
A. Yes, sir.
Q. It has always been right where it is now?
A. Yes, sir.
Q. And you were always required to go into that yardmaster's office to get your orders?
A. Yes, sir.
Q. And about how many times per night would you go into the yardmaster's office to get orders?
A. Well some nights three or four or five times.
Q. And other nights twenty times?
A. No.
Q. Well how often other nights?
A. Well I said that is about all,—maybe some nights not at all.
Q. Sometimes not at all and the other nights three or four or five or six times?
A. Yes, sir.
Q. Did you work up there without orders as a rule?
A. I have worked up there at one time without orders, that is when I worked as yardmaster, I worked there without orders.
Q. Well I am speaking of the time you worked as yard conductor?
A. No, sir, I always had to get orders.
53 Q. And you wouldn't be required to go over there more than four or five times a night for orders?
A. That is all, yes, sir.
Q. Were you yardmaster up there also?
A. Off and on at times I acted as yardmaster.
Q. About how much time did you put in as yardmaster?
A. Oh, about a month or so.
Q. And of course you knew all of the lead tracks up there?
A. Yes, sir.
Q. Perfectly familiar with where they were?

OR COPY

A. Yes, sir.
Q. And how they were operated?
A. Yes, sir.
Q. And what switches led from the lead track onto other tracks?
A. Yes, sir.
Q. And how they were thrown?
A. Yes, sir.
Q. And you knew all the tracks that led off the lead track?
A. Yes, sir.
Q. Knew where they were located?
A. Yes, sir.
Q. Knew their numbers?
A. Yes, sir.
Q. How many were there leading off the westbound lead track?
A. Nineteen.
Q. How many off the east bound lead track?
A. Two.
Q. And they numbered from one to nineteen on the west bound?
A. Yes, sir.
Q. And from one to two on the east bound lead?
A. Yes, sir.
Q. And as yardmaster you could give an order to any conductor to spot a car or a half dozen cars onto number nine on the
54 west bound lead or number one or two on the east bound lead or anywhere you wanted to put them?
A. Yes, sir.
Q. Perfectly familiar with that yard?
A. Yes, sir.
Q. Had to be to perform your duty there?
A. Yes, sir.
Q. What was the custom and rule as to all of you conductors stopping your engine near that yard office when you were taking orders?
A. I didn't stop the engine there.
Q. Never?
A. Not on a night of that kind on the interlocking.
Q. I am not speaking of a night of that kind; did you ever stop your engine there when you went in to get orders from the yardmaster?
A. No, sir.
Q. Why not?
A. I always got off and went right in; very seldom I ever got off there to go in for orders.
Q. You told me you went in four or five times a night?
A. Not there; understand when I am working in Brier Hill yard I am working from one hundred yards to one mile from where this interlocking is.
Q. But you couldn't go into this yard office except you were at that yard office?
A. Yes, but I didn't pass this interlocking.
Q. But you had to stop at the yard office to go in there four or five times?

POOR

A. Yes, sir.

Q. If you stopped your engine on the west bound track to get over to this yard office you had to cross these wires didn't you?

A. No, sir, not when I was working in Brier Hill yards. I never came down with my engine to the office for instructions. I always left the crew make one move and I walked right down, not coming down as far as this interlocking or wires at all.

55 Q. Why not?

A. Because the office is about twenty or thirty yards west of the interlocking.

Q. Suppose you were westbound and got off before you got to the yard office?

A. If I had to get instruction and had a train I would stop down at the Erie block.

Q. Suppose you didn't have a train?

A. Coming up I would get off the same way.

Q. Where?

A. Right there, on the good ground; I wouldn't get off in the trap that I did because the snow blindfolded it.

Q. Now suppose you were coming up from the lower yard to the upper yard on the west bound track and the west bound track is the north track, isn't it?

A. Yes, sir.

Q. Now the yardmaster's office is on the south side of the east bound track?

A. Yes, sir.

Q. If you came up on your engine on the west bound track you would have to cross the east bound track at some point to get to the yardmaster's office?

A. Yes, sir.

Q. Now if you were west bound why wouldn't you get off your engine to the east of the yardmaster's office?

A. To the east of the yardmaster's office?

Q. Yes.

A. Why I should.

Q. Of course you would.

A. Sure I would.

Q. And if you did you would have to cross those wires?

A. No, sir.

Q. How far east did that extend beyond the yardmaster's office?

A. East?

Q. Yes.

A. Why about as far as from here to that clothes rack there.

Q. Now Mr. Welsh, let me understand you,—do you mean

56 to say to me and this jury that you worked in that yard for ten or twelve years and had occasion four or five times a night to go into that yardmaster's office and that you never knew that those wires or pulleys were there?

A. I didn't know they were there or I wouldn't have gotten off there.

COPY

Q. Will you explain to me now how you suppose those switches were operated?

A. I knew there was interlocking there and the reason I got off where I did, twenty or thirty yards east of the yardmaster's office, I knew there was a big bunch of it in front of the yardmaster's office which I wanted to avoid. I got off twenty or thirty yards east of that and got off in a trap.

Q. Well cut out the trap, you say you knew they were in front of the yardmaster's office?

A. Yes, sir, that is the reason I got off twenty or thirty yards this side of it.

Q. Then why did you tell me a moment ago you never knew there was any wires or pulleys there if you did know?

A. I certainly didn't see anything like that. I seen there was an interlocking there and I thoroughly knew it,—not where I got off.

Q. Didn't you tell Mr. Stewart within the last ten minutes that you never had seen these pulleys there and never had seen these wires there?

A. I never seen those wires.

Q. Did you tell Mr. Stewart that within ten minutes?

A. I said the interlocking,—I never seen those wires or this pulley there; I seen and knew the interlocking was there but not these pulleys.

Q. How did you suppose those switches were operated?

A. From this interlocking.

57 Q. You didn't suppose the tower operated them?

A. From the interlocking where I got off this side of.

Q. What interlocking?

A. The interlocking.

Q. What do you mean by interlocking?

A. All these pulleys and wires and fixtures and so forth that is up further, above where I got off onto this pul-ey.

Q. Well you knew they were there, up further?

A. Yes, sir.

Q. How did you happen to know?

A. I saw them there.

Q. How far east of those were the others that you fell on?

A. About ten feet.

Q. And will you tell the jury how you could see these that were right in front of the tower and couldn't see these others ten feet away?

A. They extended up higher and are bigger.

Q. What is bigger?

A. Why the pulley wheels and wires and big bars and rods.

Q. What bars were there?

A. There is big flat bars there now, operating bars and everything.

Q. Where are they?

A. Right in front of the yardmaster's office which I avoided getting off on.

Q. Whereabouts in front of the yardmaster's office, between the tracks?

POOR

A. Right between the east and west bound track.
Q. Between the east and west bound tracks there were big bars and pulleys there?
A. Yes, sir.
Q. You had seen all those?
A. Yes, sir.
Q. Did you ever notice where those wires led to down the track?
A. No, sir.
58 Q. How does it come you could look at that pulley and didn't know where the wires went?
A. I didn't see the pulley there that I got off on.
Q. You never had seen them?
A. Never as I can remember.
Q. In your ten years' experience?
A. Never.
Q. Four months of it daylight experience?
A. Yes, sir.
Q. Getting off there four and five times a night to go into that office for orders?
A. Yes, sir.
Q. Tramping over them in all conditions of weather you never knew those wires were there?
A. Yes, sir.
Q. And you swear that to this jury?
A. Yes, I do.
Q. Now you say you did know there was one device there in front of that tower?
A. Yes, sir.
Q. How many switches were there in close proximity to that tower?
A. Why it is the only inlet and outlet of the yard, the cross-over, that is all, just about two switches.
Q. Are they opposite each other or is one farther east than the other or further west?
A. They are both right there together, one enters into that yard and coming out, and the other crosses over.
Q. Where is this crossover switch?
A. All of them you see there are crossover switches, approaching from the east to the yard or the west to the yard.
Q. Which switchpoint did this device operate that you knew about being there?
A. It is supposed to operate them all I guess that is what I thought. I supposed that.
59 Q. Why did you think that when they threw the switch of the west bound track it also threw that switch on the east bound track?
A. Why, no.
Q. Well then you didn't suppose that one operated them all?
A. I supposed that the whole bunch was there together and part of it threw one switch point and the other part threw the other, whichever lever, of course I don't understand the interlocking; I am not an interlocking expert.

COPY

Q. You are a railroader and yard conductor of twelve years' experience?

A. Yes, sir.

Q. Working in and about those yards and all over this whole city,—the yards of the whole city,—and you didn't know how those switch points were operated?

A. No, sir.

Q. Did you have control of that engine, Mr. Welsh?

A. Yes, sir.

Q. Could you start it and stop it at will?

A. No, sir.

Q. Why not?

A. How do you mean? There is an engineer you know.

Q. Why the engineer answered your orders, didn't he?

A. To a certain extent he did; he is the engineer.

Q. Wasn't he under your control?

A. Yes, sir, to a certain extent.

Q. Well to what extent?

A. To the extent that he uses his ability the same as mine,—if he has any doubt he don't,—any more so than I do.

Q. When you give him a signal to stop is he bound to obey it?

A. Yes, sir.

Q. So you had control of stopping that engine whenever you saw fit?

A. Yes, sir.

60 Q. And you also had ability and authority to start it whenever you saw fit?

A. No, sir.

Q. By signal?

A. No, sir.

Q. He didn't have to obey your order to start?

A. No, sir, he did not.

Q. Well in what cases is that true, I would like to find out about that?

A. Why providing that I went up and wanted to run them out ahead of a passenger train or second class train or something was due and it was interlocked and which often is, the engineer would say, "No, I am not going."

Q. The engineer would refuse to obey your order in the face of impending danger?

A. Yes, sir.

Q. And that is an exception to the rule that he must obey your orders in all other cases?

A. Yes, sir.

Q. So that unless he saw that he was going in the face of impending danger he had to stop that engine and start it whenever you gave him the signal so to do?

A. Yes, sir.

Q. You could have stopped that engine that night before you got off?

A. I didn't want to.

Q. I say you could have?

A. Yes, sir.
Q. You knew it was blowing and snowing?
A. Yes, sir.
Q. And yet you took the chance of stepping off the engine while it was in motion?
A. Yes, sir.
Q. In proximity at least to the place where you knew there was an interlocking device with wires and pulleys?
A. No, sir. I didn't know there were any where I got off.
Q. Didn't you tell the jury you knew they were in front
61 of the yardmaster's office?
A. I didn't get off in front of the yardmaster's office.
Q. Where?
A. Twenty or thirty feet this side, east.
Q. You knew this interlocking device was — twenty or thirty feet of you?
A. Yes, sir.
Q. That is the one that you remember of seeing?
A. Yes, sir.
Q. And the only one?
A. Yes, sir.
Q. You hadn't seen these wires that run down there between the main track, thirty feet, sticking about six inches above the ground and running around pulleys in your ten or twelve years of service had you?
A. No, sir.
Q. Didn't know they were there?
A. No, sir.
Q. You were west bound that night?
A. Yes, sir.
Q. And the west bound track is the north track?
A. Yes, sir.
Q. Did you say to us or to Mr. Stewart that you got off and stepped on the pulley furthermost east or furthermost west?
A. East.
Q. How do you know?
A. I know.
Q. Why you didn't know it was there?
A. I know when I got up at the time when I got hurt; I knew where I got off.
Q. Did you look around to see where you got off?
A. I was laying right there; I had to and getting my foot out from under the wires.
Q. Did you notice whether it was the east *of* west pulley?
A. It was east.
Q. How do you know?
A. I was laying right there.
62 Q. And you looked to see?
A. I didn't until I was out of the hospital and then I knew just where I got off.
Q. But you didn't know that night what pulley you stepped on?
A. Oh, yes, sir.

OR COPY

Q. Well there are three pulleys there?
A. Yes, sir.
Q. On top of one another on a peg?
A. No, sir.
Q. You know what I mean?
A. No, sir, I don't.
Q. Are there three pulleys in plain sight between the west bound and east bound track?
A. Upon my word I don't know; I couldn't answer that.
Q. Well are there two?
A. I don't know; I know there is one.
Q. Where is it?
A. The one I got off on there.
Q. Well you told us you also knew of one west?
A. I knew that all this interlocking and stuff all above there in front of the office.
Q. You knew there was a pulley there?
A. I knew there was everything there.
Q. Well then you did know there were two pulleys?
A. Yes, sir.
Q. Why did you tell me a moment ago there were two?
A. I mean right where I got off there was only one.
Q. Mr. Welsh, I am trying to make myself clear to you.
A. I am trying to make myself clear to you.
Q. I asked you if you didn't know there were three pulleys between those tracks, not right at the same point,—one to the east, one in the center and one at the west opposite the interlocking shanty or tower?
A. No, I don't know there is three; I know there is one.
63 Q. Where was it?
A. The one I got off on; east of the office.
Q. And you don't know whether there was any more there or not?
A. No, sir.
Q. Now do you know how many wires that pulley accommodates?
A. No, sir.
Q. Why you went up there to see did you not, after your accident?
A. I don't know how many wires.
Q. No, no, how many wires run around that pulley?
A. No, sir, I don't; I think it is a chain that goes around the pulley if I ain't mistaken.
Q. How many chains run around the pulley?
A. I don't know; I think there is three; I know seeing one.
Q. Well you did see one?
A. Yes, sir.
Q. You know there is one?
A. Yes, sir.
Q. What size chain is that?
A. Well now in fact I don't know.
Q. Well is it a chain the links of which are one-quarter inch in diameter?

POOR C

A. I would say the links were made out of about one-half inch iron.

Q. So that the diameter of the links about one-half inch and there are three of those chains run around that pulley to the best of your knowledge?

A. Yes, sir.

Q. Do you know how those chains operate, whether they run around the pulley all of them in the same way, that is ran down the track and around the pulley to the north or down the track and around the pulley to the south?

A. No, sir.

Q. Well when you were up didn't you examine to see what switch those chains operated?

A. No, sir.

64 Q. Why didn't you?

A. I didn't.

Q. What tension was there on that pulley by those chains?

A. When the switch is throwed for the yard there is no tension at all on the pulley because I have stood on the pulley and it turned.

Q. When did you do that?

A. I done it directly after I was hurt and I done it two or three weeks ago.

Q. You done it directly after you were hurt that night?

A. After I came from the hospital.

Q. You went up there after you came from the hospital?

A. Yes, sir.

Q. And you got on the pulley?

A. Yes, sir.

Q. To see whether it would turn?

A. Yes, sir, when the switches are lined up off of the west bound into the yard.

Q. When they are lined up to go into the lead you mean or when they are lined up not to go into the lead?

A. When they are lined up to go into the yard off of the west track.

Q. You don't know whether they were lined up that night?

A. Yes, sir, because the engine was partly headed in there and we had the block.

Q. And you went up to see whether this pulley would turn, what did you do that for?

A. Just to satisfy my mind,—to be positive and sure what I was talking about.

Q. You were not certain?

A. Yes, sir, but I wanted to be positive about it.

Q. What was the necessity of your going up there?

A. I went up to see and show other people that my evidence in regard to that was just right.

65 Q. You told me you wanted to be certain,—certain of what?

A. Certain that the wheel would turn.

Q. Why you knew it had turned?

A. Yes, sir.

COPY

Q. Then why did you need to be any more certain about it?
A. I didn't know but what it was just an accident that it turned that night but there is no tension at all on that wheel.
Q. There is just one chain around that wheel?
A. Yes, sir, just one chain.
Q. And you say that there are not three chains around that pulley?
A. Not that one pulley, no, sir.
Q. Well that pulley is all one?
A. No, sir, there is three pulleys there.
Q. One over the other?
A. Yes, sir.
Q. You mean three sheaves and one pulley, three grooves and they all work independent of each other?
A. Yes, sir.
Q. Three sheaves and one pulley,—one upright goes clear down through the three and these work independent of each other and different chains work on it?
A. Yes, sir.
Q. Now you were going west bound?
A. Yes, sir.
Q. Which side of the engine step board were you standing on?
A. On the left hand side going west.
Q. And you had a lantern in your hand?
A. Yes, sir.
Q. What kind?
A. The Erie lantern.
Q. Was it lighted?
A. Yes, sir.
Q. And it was snowing, there was snow on the ground?
A. Yes, sir.
Q. It couldn't have been very dark then?
A. Oh, it was dark, it was night.
66 Q. But nights differ in darkness?
A. It was one of those dark, snowy nights, a dark snowy night.
Q. Well so dark you couldn't see the ground?
A. I could see the snow; I couldn't see anything else.
Q. You could see the yardmaster's house?
A. Yes, sir.
Q. And you could see the place where you wanted to get off?
A. Yes, sir.
Q. So that it wasn't darker than hundreds of other nights you had worked there?
A. Oh, no.
Q. And it was a little bit lighter because it was reflected by the snow?
A. Oh, it was dark; it was wet, damp, snowy, dark night.
Q. Do you remember whether you were facing west when you approached that lead track?
A. Yes, sir.

POOR

Q. Standing with your face in the direction you were moving?
A. Yes, sir.
Q. Which hand did you have your lantern in?
A. My right hand.
Q. And you stepped off the engine to clear it of course and started to run over toward the yardmaster's office?
A. I didn't start to run,—just stepped off and onto the wheel.
Q. Did you step off slowly?
A. I stepped down like that and onto the wheel and it throwed me over like that and into the wires and they caught me and threw me under t' engine.
Q. Of course you stepped off with as much momentum as the engine was moving,—you say it was moving two miles an hour,—which foot lit on the sheave of this wheel?
A. The right foot.
67 Q. That was the first step you took?
A. Yes, sir.
Q. You stood on your left foot and stepped off with your right foot and the first foot that struck anything was your right?
A. Yes, sir.
Q. It struck the top of this pulley and turned and you fell back on your back?
A. Off just like that; a little more with that foot; when I was coming back with that foot it went right under the wire; they are about two feet apart; the wire from this pulley; and when I was falling forward of course I couldn't get this foot out to recover,—it throwed me right under the engine.
Q. The wire was on the right hand side of you?
A. The wire was right across between the tracks.
Q. Which side of you, east or west?
A. The west until when I got on the pulley wheel,—until I got my foot on it and was falling over then it was east of me because it throwed me under that way and tripped me under the engine.
Q. Well now, Mr. Welsh, let me get this in my mind,—this interlocking device comes down between these tracks and to this point and then crosses the west bound track doesn't it?
A. Yes, sir.
Q. And this sheave that you speak of is in the middle between the west bound and east bound track?
A. Yes, sir.
Q. Now then as you came up there were no wires east of you?
A. No, sir.
Q. As you came up to that sheave and stepped on it which way did it throw you?
A. Turned me right around.
Q. Turned you this way?
A. Yes, sir.
68 Q. Now what wire did your other foot get into?
A. Those two wires there.
Q. Which foot?
A. Left foot.

COPY

Q. It must have come around back again?
A. Here when I was thrown I was thrown by this wheel like this, around like this, right into these wires.
Q. So that you were facing west again?
A. Then when I hit the engine the wires held my foot and threw me under the engine.
Q. You stepped right onto this sheave and the sheave turned you clear around?
A. Like that (indicating).
Q. And your left foot caught under these wires?
A. Yes, sir.
Q. You mean the wires that caught your foot was running across the west bound track?
A. Yes, sir.
Q. Then what happened to you, did you fall on your right side or left?
A. No, sir, my left side.
Q. That caught you so that you fell back this way?
A. No, sir, when I hit that wire and scrambling to get back I went right under the engine,—I couldn't help myself.
Q. Which way did it throy you, this way?
A. Left side.
Q. It must have turned you around again?
A. No, sir.
Q. You were headed this way?
A. Yes, and if the wire catches you like this and throws you like that sideways and you can't get up.
Q. You went in this way?
A. Yes, with the wires that tripped me.
69 Q. Fell down on your left hand side?
A. Yes, sir.
Q. About how high did this pulley wheel extend above the ground?
A. Five or six inches.
Q. What was its diameter?
A. About six inches.
Q. And how was it supported there or held in place?
A. Why I suppose there was a block there and a pivot down through and they were set on the pivot.
Q. Do they have occasion to grease those in the operation of them,—put oil on them so they will work easily?
A. Oh, yes.
Q. You have seen men working around the yards greasing those pulleys?
A. Not those but I have other pulleys.
Q. And greasing the chain so they will slide around on the pulley, what do they put on, heavy tar?
A. No, sir, just oil, heavy black oil.
Q. Whose business is it to do that?
A. Well the foreman in that line, I don't know.
Q. Oh, yes, you know, whose business is it?

POOR

A. Well their foreman, there used to be a gentleman by the name of Costello in Niles,—he used to be in charge of the interlocking in Niles.

Q. But who had charge of the interlocking?

A. Oh, all through here he had the whole thing.

Q. He had men go and do this work, grease them?

A. Yes, sir.

Q. About how frequently?

A. Oh, I don't know, I seen them once in a while.

Q. About how often?

A. Oh, I seen them I couldn't say just how often I seen them do it, once or twice anyway.

70 Q. Once or twice,—where, in the Brier Hill yards?

A. Yes, sir.

Q. Which ones did you see them fixing there?

A. Why right in front of the yardmaster's office there.

Q. Were you standing there watching him when he did that?

A. No, sir, I was just coming down, coming east and I would cross over before we came there and I would see him doing that.

Q. Coming on foot,—were you walking?

A. Yes, sir.

Q. Walking down the track?

A. No, sir, down from the yard,—you see in the yard running a crew in the yard you are one hundred yards from this interlocking and I came down and crossed over the track west of this office and right into the office.

Q. I suppose sometimes there would have to be some movements made in coupling up and uncoupling cars around the yardmaster's office?

A. No, sir.

Q. In front of it and around it?

A. No, sir.

Q. Never seen any work done there by brakemen and switchmen?

A. No, sir.

Q. Why the lead track comes right in there?

A. Yes, but they don't do no switching nor cutting off cars there.

Q. They don't?

A. No, sir.

Q. Now, Mr. Welsh, if there is a yard crew such as your crew hitches onto a drag on the lead track you often come down just so as to clear the west bound track and stay there until you can get out onto the westbound track and take that track on down?

A. Down to town?

71 Q. Yes, down to the lower yard?

A. Yes, sir.

Q. Very frequently the engines stop there and stay there for half an hour or an hour and a half waiting for such time as the track is cleared for them to go out and make a movement whichever way they want to go and you have been on the engine and waited there?

COPY

A. When I have waited for first class trains to go, yes, sir.
Q. About how far would you be from this interlocking device?
A. I have been maybe fifty yards.
Q. And four months of that service you rendered was in daylight when there wasn't anything to obstruct your view as to that track around there?
A. I had no occasion; I had to look after my own work.
Q. I know you were a good workman and all that but there was nothing to obstruct your view?
A. Well it was so small that I never paid no attention to it.
Q. Well now was there anything to obstruct your view if you had looked?
A. If I had looked?
Q. Yes.
A. I had no occasion to look.
Q. But was there anything there to prevent you from seeing that if you had looked?
A. Why no, if I went and looked.
Q. Well while you were on your engine on that lead track waiting to get out on the west bound track or east bound track, was there anything to prevent you from looking directly down and seeing it there?
A. Yes, sir.
Q. What?
A. Why two little wires the size of telephone wire, two and a half inches from the ground,—black, could I tell them and see them over there and would those wheels,——
72 Q. Well you were up in your engine?
A. Yes, sir.
Q. But you couldn't see these sheaves and pulleys, six inches standing up and six inches in diameter, and you say to this jury you didn't know they were there?
A. I did not.
Q. Mr. Welsh, did you make a statement about this matter at one time?
A. I have told the claim agent just as I am telling you folks now.
Q. I am just asking you whether you made a statement?
A. No, sir, I didn't make a statement.
Q. Is that your signature?
A. No, sir, that is not my signature.
Q. Look at it before you say no, sir.
A. No, sir, I made no statement.
Q. Is that your signature?
A. No, sir, that is not my signature.
Q. Is that?
A. No, sir. It is not.
Q. Did you on the 9th day of March, 1911, make this statement?
A. No, sir, I told the claim agent this gentleman right here.
Q. I am going to ask you this so that you know what I am asking you,—you and I will get along nicely if you just listen to my question

POOR

and I will give you an opportunity to answer: "The engine was headed west and we were on the west bound track and as we approached the crossover switch which leads into the yard and the front end of the engine was about on the switch point and about directly in front of the yard office, I stepped down off the footboard," did you make that statement to the claim agent?

73 A. I didn't make no such statement as that. I told the claim agent just as I am telling you gentlemen here now.

Q. "I stepped off the footboard to go into the yardmaster's. I stepped down with one of my feet and took one or two steps toward the yard office"?

A. No, sir, I didn't make any such statement as that. When was that?

Q. On the 9th of March?

A. I was hurt on the 7th.

Q. "When I stepped onto the interlocking pulley and my foot slipped and I fell backwards and partly turned around. As I turned around toward the left I got one of my feet on the interlocking wire and I fell back toward the engine and reached out my left hand to save myself." Didn't you make that statement?

A. I made no statement only just what I told you now.

Q. Did you make this statement?

A. No. sir, I did not make that statement.

Q. "As I fell down I was rolled over by the aid chest and throwed out my left arm and either one of the front wheels of the tank or one of the rear wheels, I don't know which, ran over my left elbow."

Did you make that statement?

A. No, sir.

Q. "My arm was doubled up and the wheel ran over the forearm and upper arm near the elbow. There was about two or three inches of snow on the ground and snow covered the wire and pulley. When I got off the footboard to go into the yard office I didn't think about these interlocking wires." Did you make that statement?

A. No, sir.

Q. "I have worked for the Erie about fourteen or fifteen years and have worked at east end of Brier Hill six or — years

74 in all, both nights and days, but mostly nights. It had been snowing and blowing just previous to the accident, but I do not know whether it was snowing at the time of the accident or not." Did you make that statement?

A. No, sir, I did not.

Redirect examination.

By Mr. STEWART:

Q. Mr. Welsh, did I understand you to say that you passed up and down this track in front of this office one hundred times a day?

A. No, sir.

Q. What was it you said happened a hundred times a day?

A. Different moves of one mile or a half a mile that I would make

COPY

with the engine back and forth cutting the car off or switching it on a different track.

Q. Where was your work carried on mostly?

A. Down in the yard.

Q. Where is "down in the yard" with reference to this interlocking?

A. Oh, from a hundred yards to a mile.

Q. And does your duties then keep you back in there most of the time?

A. All of the time.

Q. And when you would come up on the main track, east, or about the office there, about how many times was that done a day?

A. Maybe that wouldn't be done once in a week or once in a month.

Q. You didn't haul drags down back and forth did you?

A. Not when I worked up in the yard I didn't.

Q. And how long had you been working in the yard before you got hurt?

A. Up there?

75 Q. Yes?

A. Well, now it was just the roster before that—I can't say—well I would say two months.

Q. You had been working in the yard two months before that?

A. Yes, sir.

Q. Where had you been working before that?

A. On the Ohio Steel track and N. K. up to the branch to Ohio Junction and the steel plant and P. & L. E.

Q. Then you passed over this?

A. No, sir.

Q. Which way did you go?

A. Up the Canal branch.

Q. In operating your train back and forth there you went on the Canal branch and didn't go past this place here?

A. No, sir.

Q. And you worked, when you were up in the yard, away west of this point?

A. Yes, sir.

Q. So that your trips down this way weren't very frequent?

A. No, sir.

Q. When you did have occasion to go down along this track here did you walk or did you ride?

A. I always rode.

Q. What did you ride on?

A. On the cars or in the engine.

Q. And in riding on the cars or the engine what was your attention drawn to, the signals or the ground?

A. The signals.

Q. They weren't along this interlocking?

A. No, sir.

Q. So that there will be no mistake about it; which wire was it

POOR C

that caught your feet, was it the wire running east and west along the tracks or the one that was running north and south?

A. North and south, yes, sir.

76 Q. Those are the wires you say you never saw, did you?

A. Yes, sir.

Q. You say you went to the yard office four or five times a night, or about, sometimes, and when you did so from which direction did you come—did you come from the west toward the yard office or come from the east toward the yard office?

A. Came from the west.

Q. And in coming from the west would you have any occasion to cross over this interlocking?

A. No, sir.

Q. Or to pay any attention to it?

A. No, sir. You can see there by the picture it is east of the office.

Q. Now, when you speak of your familiarity with the yard would you consider this part here in front of the office or where this interlocking is any part of the yard?

A. No, sir, that is the main track.

Q. And your yard is——

A. West of that.

Q. You say you never stopped your locomotive here in front of the office on the main track?

A. Never do on account of the interlocking there in cold weather—freeze it up.

Q. You were hurt on the seventh of March?

A. Yes, sir.

Q. About eleven P. M.?

A. Yes, sir.

Q. And when was your arm operated on?

A. Why, it wasn't touched after the first dressing—my arm wasn't touched, I don't think for five days after the night that it was hurt—it was five days after before it was dressed.

Q. What was your condition as to being in great pain and agony?

A. Well, for the first three weeks I used to get every night what they called hypodermic injections.

77 Q. What is that, morphine?

A. Hypodermic in the arms I used to get two or three at night and one and two in the day.

Q. Was that morphine?

A. It is morphine, I suppose—kind of puts you dozy to sleep.

Q. Do you have any recollection of having any talk with the claim agent in two weeks after you got hurt?

A. No, sir.

Q. Where did you have a talk with him?

A. At his office.

Q. Do you remember of ever having to talk with him in the hospital at all?

A. I do in about three days before I left.

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Q. Do you remember of having a talk with him a couple of days after you were hurt?
A. No, sir.
Q. If you had any talk with him then you haven't any recollection of it now?
A. No, sir.
Q. And have you any recollection of having signed a paper two days after you were hurt?
A. I have no recollection of ever signing any paper.
Q. Concerning this accident?
A. Concerning that.
Q. In your talks with the claim agent have you any recollection of his asking you to sign any paper?
A. No, sir.

Mr. KENNEDY: I don't know how this is competent, your honor, I asked him if he made a statement and he said "no."
COURT: It is a little out of order but it is competent if you prove that he did make one.
78 Mr. KENNEDY: It is competent in rebuttal in case we make the issue.
COURT: It is immaterial now.

Q. After you were injured, Mr. Welsh, and when you went up to the scene of the accident did you go up there with a photographer—a man who took the picture here—did you go with him?
A. Yes, sir.
Q. And did you show him where you were hurt?
A. Yes, sir.
Q. And this wire that you refer to like a telephone wire, Mr. Welsh, a hundred yards away or so from these small wires that were strung along the ground there, would you see them?
A. No, sir.

Defendant objected to question.

Q. Well, could you see them a hundred yards away?
A. No, sir.

Recross-examination.

By Mr. KENNEDY:

Q. You say you never stopped your engine there on account of the interlocking system freezing up, is that what you said?
A. Why, it is a very rare thing of them stopping there, because the water flowing onto the interlocking and the switch points it freezes it up you know, and——
Q. About how many months in the winter does it freeze up?
A. Well, I don't know; all winter.
Q. That wouldn't be a very good reason in summer would it for not stopping there?
A. Oh, no.
79 Q. Well, why didn't you stop there in summer?
A. Because I was using a little better judgment—it was

POOR

winter—at least I thought I was using a little better judgment and he would proceed on a little.

Q. Well, the question is whether or not you ever remember of stopping there in summer?

A. I don't remember.

Q. Well, why didn't you?

A. Because we would always proceed right in the yard.

Q. You told me a moment ago it was because of the switch points freezing?

A. Well, I never stopped there. I worked at different places and there was times I went down or went up there that I never made a stop there for orders.

Q. How many times do you think you have received orders from the yardmaster's office in the twelve years you were there?

A. I don't know; a good many times.

Q. Well, about how many?

A. I couldn't say.

Q. Hundreds of times?

A. Yes, sir.

Q. Every time you received orders you were at the yardmaster's office?

A. Oh, no, sometimes the yardmaster comes out and gives you a little instruction in the yard what to do.

Q. When you got orders for the movement of trains as a rule you got it in the yardmaster's office?

A. Yes, sir.

Q. And hundreds and hundreds of times you have been in that office to get orders?

A. Yes, sir.

Q. It wouldn't have been an unusual thing for you to stop the engine?

A. Well, I would never take the engine with me at that time.

80 Q. Well, you could see the conditions there just as well whether the engine was there or not?

A. No.

Q. Why not?

A. I didn't have nothing to do with it; I was looking out for the interest of my orders and instructions the yardmaster gave me.

Q. Well, you had to look into the yardmaster's office?

A. Yes, sir.

Q. And you had to look either way for trains coming either way?

A. Yes, sir.

Q. And you naturally had to look at the track once in a while?

A. I wasn't looking down.

Q. You never looked down. How far away is this wheel that you stepped on from the yardmaster's office?

A. Well, thirty yards or so.

Q. Do you think it is that far?

A. I think it is.

Q. And you never had occasion in the hundreds of times you have

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been at that yardmaster's office ever to look thirty yards around that track?

A. Never had no occasion; can't memorize ever seeing that pulley or wires.

Q. Where was this dwarf target?

A. North of the lead—switching lead.

Q. How far from this interlocking device that you speak of?

A. Over three tracks.

Q. How far from it east or west; was it further east or further west?

A. I couldn't say now, I don't know.

Q. Don't you know that these wires run right across to it that you stumbled over?

A. Well, if it did it is right across from the wires.

Q. Well, I suppose you had occasion in ten or twelve years to look at that target?

A. Yes, sir.

81 Q. You knew where it was?

A. Yes, sir.

Q. How did you suppose it was operated?

A. I suppose it was operated, but I never knew that——

Q. How did you suppose it was operated?

A. I didn't know.

Q. There wasn't any man standing there operating it, was there?

A. No, no.

Q. Well, there was some mechanical device and you knew it that operated that target?

A. Yes, sir, I did.

Q. And you had seen the target make its different movements hundreds and hundreds of times?

A. Yes, sir.

Q. And yet you never knew there was wires running acros there that operated it, did you?

A. I didn't never see them wires.

Q. You never knew they were there?

A. No, sir.

Q. Well, now then, will you tell us why you were afraid to sto your engine there if you didn't know there were any interlockin devices there?

A. Why the switch points were right above there.

Q. That was the reason?

A. Oh, I never stopped or anything; it was just proceeding ver slowly to proceed right along in and I was to get instructions wh to do off the yardmaster, Mr. Condon.

Q. Well, you were yardmaster yourself?

A. No, sir, Mr. Condon.

Q. Not that night, you were yardmaster yourself for two or thr months?

A. Yes, sir.

Q. And stayed right in the yardmaster's office?

A. Yes, sir.

82 Q. Spent ten or twelve hours a day or night there?

A. Yes, sir.

Q. When was you yardmaster, dayturn or nightturn?

A. Nightturn.

Q. How long ago was that?

A. Oh, about three years ago.

Q. Since they put in this interlocking system?

A. Yes, sir.

Q. And yet you tell the jury that having spent two months right there in the yardmaster's office twelve hours a day that you never saw these sheaves and pulleys and wires?

A. Yes, sir.

Q. You say that do you?

A. Yes, sir.

"That's all."

Whereupon plaintiff rested his case.

The defendant, at the close of plaintiff's evidence, moves the court to instruct the jury to return a verdict for the defendant on the ground and for the reason that the evidence discloses that the plaintiff assumed the risk of the conditions complained of and that he was likewise guilty of negligence producing or contributing to produce his injury, and on the further ground that the defendant claims a privilege and immunity from liability under the provisions of an act of congress commonly known as "Employers' Liability Act" of Congress of April 22, 1908, which motion is overruled; defendant excepts.

The defendant to maintain the issues on its part to be maintained and to rebut the evidence offered by plaintiff called the following witnesses and introduced the following evidence, to-wit:

83 JAMES T. WELSH, being called by the defendant for further cross examination testified as follows:

Recross-examination.

By Mr. KENNEDY:

Q. Did I understand you to say that when you came down to F. D. you got a caboose and car?

A. Yes, sir.

Q. What kind of a car?

A. Car to go out on freight 176.

Q. What is 176?

A. Second-class train, Cleveland to Meadville.

Q. Meadville, Pa.?

A. Yes, sir.

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Redirect examination.

By Mr. STEWART:

Q. When you came down that time how did you pass this point, ride or walk?
A. On the caboose.
Q. Were you riding in the caboose or on the outside?
A. In the caboose.

Recross-examination.

By Mr. KENNEDY:

Q. Do you know where this car was consigned to?
A. No, sir.
Q. But it was to go out on that train for Meadville?
A. Yes, sir.

"That's all."

84 The defendant then called as a witness to testify in its behalf EDWARD BLAUSER, who being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Blouser, what is your full name?
A. Edward Blauser.
Q. Where do you live?
A. I am boarding on Himrod Avenue.
Q. You are in the employ of the Erie Railroad Company?
A. Yes, sir.
Q. And I will ask you if you were a member of this train crew under the charge of Mr. Welsh on the night he was injured?
A. I was working on the crew, yes, sir.
Q. What was your position?
A. Braking.
Q. Were you rear or head brakeman?
A. Rear.
Q. Whereabouts were you, Mr. Blauser, when the accident occurred?
A. I was on the fireman's side of the engine.
Q. Your engine I believe had been where?
A. To Youngstown.
Q. Where had you been with your engine just before the accident?
A. We took a caboose and car of merchandise to Youngstown.
Q. What was done, what kind of a car was it?
A. It was a box car for 176, fast train goes from Cleveland to Meadville.

85 Q. This car was to go out on that train to Meadville?
A. Yes, sir.

POOR

Q. The car was to go to Meadville?
A. Yes, sir.
Q. After having delivered the car and you left it where?
A. Put it on what is known as number one track—first track this side of the main track at the freight house, Erie freight house.
Q. After delivering it there then, what did you do?
A. Took the caboose on down to what they call Fitch's pocket—goes into Fitch's warehouse.
Q. Then what did you do?
A. Crossed over them crossovers and came up and took water.
Q. Then did you go back to the Brier Hill yard?
A. Yes, sir.
Q. Is that the movement you were executing when this accident occurred?
A. Yes, sir.
Q. Whereabouts were you riding Mr. Blauser?
A. I was sitting behind the fireman on the fireman's side up in the cab.
Q. Who was in the cab with you?
A. Chester Hull, the fireman was sitting next to me and John Ohldecker, the head brakeman, ahead of him.
Q. Was the engineer in his place?
A. Yes, sir.
Q. Where was the conductor?
A. Right on the front footboard.
Q. Did you see the accident happen?
A. No, sir.
Q. What was the first thing that you heard?
A. I heard Ohldecker say "Stop the engine. Welsh's lamp went out."
Q. Then did the engine stop?
A. It was moving at the time he said that.
86 Q. After that did he stop?
A. Yes, sir.
Q. What did you do then?
A. We got off to see how bad he was hurt and picked him up.
Q. Took him into——
A. Into the yard office, yes, sir.
Q. In what position was Mr. Welsh when you got to him?
A. He was laying on the side of the track.
Q. Were his feet or arms caught in any way?
A. No, sir, not at that time.
Q. How was he laying?
A. I think he was laying with his head east and his feet west.
Q. On which side or was he on his back?
A. I ain't sure just how he was laying.
Q. His head to the east and his feet to the west?
A. Yes, sir, kind of cross ways like.
Q. Was this between the two main tracks?
A. Yes, sir.
Q. Your engine was on which track?

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A. Westbound main track.

COURT: Could you tell from anything you found what had crushed his arm, what part of the machinery?

A. No, sir, it wasn't caught in anything at the time we picked him up.

COURT: You found no marks there to tell you?

A. No, sir.

Q. How long had you been in Mr. Welsh's crew?

A. I caught the crew on the 16th of January I believe the roster opened.

Q. Of 1911?

A. Yes, sir.

87 Q. How much of the time had you been working in this yard after that on this crew?

A. I was on the crew ever since.

Q. Did you work nights or days?

A. Nights.

Q. Was Mr. Welsh always your conductor?

A. Yes, sir, he got the job on the roster at the same time I did.

Q. What was the nature of the work that this crew did, Mr. Blauser?

A. Switching trains that pulled in the yard there.

Q. Well, now explain just a little more fully what you mean by switching trains. Just tell in detail the nature of the work which your crew did?

A. Well, a freight train pulls into the yard there; the yard clerk goes out into that yard and marks them, whichever track they go onto he marks them with chalk and we pull them out and switch them in on the proper track.

Q. In other words is it your business to distribute cars to the proper places?

A. Yes, sir.

Q. Taking the trains as they come in from the main line?

A. Yes, sir.

Q. Then, what if anything, do you have to do with making up trains?

A. Well, we have two or three different trains we make up during the night.

Q. How do you do that?

A. We make up a Cleveland local on number seventeen—put the cars in station order and make up a New Castle run and what they call a J. U. run from Cleveland to Ferona.

Q. Ferona in Pennsylvania?

A. Yes, sir.

88 Q. And is New Castle in Pennsylvania?

A. Yes, sir.

Q. Mr. Blauser to what place do these different cars go that you switch up in the manner you described?

A. That is the Ferona?

Q. Any of the cars you handle?

A. They go to Sharon, South Sharon and Hubbard and New Castle.

Q. Do you handle cars which go all over the main line?

A. Yes, sir.

Q. Of the Erie Railroad company, this crew switches them back and forth?

A. Yes, sir.

Q. In making up the trains which go out from Youngstown to various points?

A. Yes, sir.

Q. All over the Erie system?

A. Yes, they go all over.

Q. And is that the kind of work you were doing the night Mr. Welsh was injured?

A. Yes, sir.

Q. Who took charge of the switching after Mr. Welsh was taken away?

A. I handled the crew the balance of the night.

Q. What was the nature of the work you did?

A. I went on number three to make up this J. U. run—the Ferona run.

Q. Where did you get your cars for that?

A. Off of number three track.

Q. Were those the first cars you switched after Mr. Welsh was injured?

A. Yes, sir.

Q. Where did you get your orders for that?

A. Mr Condon gave them to me—the yardmaster.

89 Q. Are those the orders which Mr. Welsh would have gotten had he not been injured?

A. Yes, sir. I should judge they are.

Q. And after completing the Ferona run what work did you do that night?

A. I think we went to supper; it was about supper time after we finished that.

Q. Did you do any further switching that night after supper?

A. We switched different trains after supper, yes sir. I don't know just what they are.

Q. Would you be able to tell where any of those trains were bound for?

A. The trains pull in there what is called the "new yard" seven tracks up there.

Q. What trains were those?

A. The Hubbard run and the Shenango run.

Q. What is the Shenango run?

A. From Brier Hill to Shenango.

Q. Shenango, Pa.?

A. Yes, sir.

Q. What other trains?

A. New Castle local pulls in there.

Q. New Castle, Pennsylvania?

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A. Yes, sir.
Q. What else?
A. Well, there is lots of trains come from the west, set off in there.
Q. From what points in the west?
A. Well, they come from Cleveland, Kent and——
Q. Any train from Chicago?
A. There isn't any goes through that way.
Q. Or are the trains made up at Kent including cars for Chicago?
A. Sir?
90 Q. Are trains made up at Kent, including cars from Chicago?
A. Yes, sir, they go over the main line from Kent to Meadville.
Q. At any rate during the rest of this night were you doing the work that Mr. Welsh would have done had he not been injured?
A. Yes, sir.
Q. Did you during that time handle cars or trains or parts of trains which went out to these different points?
A. Yes, sir.
Q. It had been snowing that night?
A. There was about four inches of snow on the ground.
Q. What is the fact as to whether or not is was snowing at the time Mr. Welsh was hurt?
A. It wasn't snowing at that time.
Q. How long before that had it quit snowing?
A. I don't remember of it snowing any that night. It seems to me this fall of snow came during the day previous.
Q. Previous to the time he was hurt?
A. Yes, sir.
Q. And at the time he was hurt you say it was not snowing at all?
A. No, sir.
Q. Did it snow any more that night?
A. No, sir.

Cross-examination.

Mr. STEWART:

Q. You say it is your recollection it didn't snow that night?
A. No sir, not that night.
Q. Sir?
A. No, sir, it didn't.
Q. What circumstances or what was there about the night that enables you to remember now that it didn't snow any that night?
A. I was out there working.
91 Q. You don't remember all the nights it snows do you?
A. No, sir, not exactly.
Q. Did it snow on the 10th of last March?
A. I don't know.
Q. Did it snow on the 4th of last March?
A. I couldn't tell you.
Q. Did it snow on the 5th of last March?
A. Not that I know of.

Q. You don't know whether it did or not do you?
A. No, sir.
Q. Do you know whether it showed on the 7th day of March or not?
A. No, sir, it didn't.
Q. You know it didn't snow on that day?
A. Yes, sir.
Q. But all the other dates around it you don't know?
A. No, sir.
Q. It may have snowed on the 8th of March?
A. (No response.)
Q. Sir?
A. No, sir, it didn't snow on the 8th.
Q. Did it snow any more after the 7th day of March last year?
A. I couldn't tell you—It probably did.
Q. Don't you know whether it did or not?
A. I don't know the certain dates it did.
Q. Well, do you know whether it did or not?
A. No, sir.

"That's all."

92 The defendant then called as a witness to tesify in its behalf J. F. OHLEDECKER, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Ohldecker, where do you live?
A. I live at present in Arlington Park.
Q. I believe you are an employee of the Erie Railroad Company and were a member of this crew under the charge of Mr. Welsh at the time he was injured?
A. Yes, sir.
Q. Where were you at that time?
A. I was in the cab on the left side.
Q. Were you head brakeman?
A. Yes, sir.
Q. And what part of the fireman's seat were you occupying?
A. I was occupying the front part.
Q. Right up by the window?
A. Yes, sir.
Q. What was the first thing that attracted your attention to the fact that something was wrong?
A. Why, I saw the lamp Mr. Welsh carried make a peculiar move and I attracted the engineer's attention and told him to stop.
Q. Was the engine moving when you saw this peculiar move of Mr. Welsh's lamp?
A. Yes, sir.
Q. About how fast?

OR COPY

A. Why I think about four or five miles an hour.
Q. Did the engine then stop after you called to the engineer?
A. Well, it wasn't stopped; it was stopping; I jumped down out of the cab then.
93 Q. And after you called to him the engine was stopped by the engineer?
A. The engineer endeavored to stop and I jumped down.
Q. Did you notice the position Mr. Welsh was in when you got to him, how he was lying?
A. Well, he was in a crippled position under the rear truck of the tank when I got to him.
Q. Which way was his head if you know?
A. Well, I was so excited I couldn't say.
Q. Were you able to tell what had crushed his arm?
A. No, I couldn't.
Q. Mr. Ohldecker, do you remember the condition of the weather as to whether or not it had been snowing?
A. Well, it had been snowing previous—the forepart of the evening—just before I came to work, but it wasn't snowing after we came to work; after I got to work it hadn't been snowing, but we had about four inches of snow.
Q. Well, at the time Mr. Welsh was hurt was it snowing at all?
A. Not to my recollection.

Cross-examination.

By Mr. STEWART:

Q. About how deep was this snow?
A. Why I think about four inches.
Q. You don't remember whether it was snowing at the time Mr. Welsh got off the locomotive or not, do you?
A. No, I don't. I couldn't say whether it was snowing or not, because the cab windows were closed. I saw only the lamp that drawed my attention.
94 Q. It had been snowing that evening?
A. Previous to coming to work.
Q. Did you walk to work that night?
A. Yes, sir.
Q. And you walked through the snow to work?
A. Yes, sir.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Ohldecker, after you got out of the cab you went to where Mr. Welsh was—was it snowing then?
A. No, sir, it was not.
Q. One other question—are you able to state at which pulley Mr. Welsh was injured—whether it was at the east one or west one?
A. I couldn't say which pulley it was.
Q. Have you any recollection on that subject?

POOR

A. He was east when we found him. When I found him he was east of the platform that goes from the office—he was east of the platform going from the office.

Q. About how many feet?

A. I should judge it was four or five feet.

Q. East of the platform that goes to the yardmaster's office?

A. Yes, sir, that goes direct into the door.

Q. I will hand you this photograph marked "Exhibit A" and ask you about how far that would be from the easterly pulley?

A. If I remember right I found him right in there between those two.

Q. Will the stenographer mark that?

A. (Marked by the steno.)

Q. Where the stenographer has indicated with a red cross?

A. That is where we picked him up.

95 Recross-examination.

By Mr. STEWART:

Q. You say he was under the tender of the locomotive?

A. Yes, sir.

Q. Could you see whether he had been dragged along the track or drawn in the snow?

A. Well, the snow was pretty well tramped down and it had been ruffled up. He may have been dragged there but I wouldn't notice that. The men were tramping there and tramping around in there all day long.

Q. And you don't know how far he was dragged or anything of that kind?

A. No, sir; as soon as I saw the lamp make the move I jumped down out of the cab to see what happened.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Ohldecker, how far would you say the engine moved from the time you saw this peculiar movement of M. Welsh's lantern until you had jumped out?

A. About the length of itself.

Q. You say the snow was tramped down there?

A. When I got down it was tramped down.

Q. Did you have any difficulty in seeing that interlocking pulley you pointed out?

A. No, sir, not then.

Recross-examination.

By Mr. STEWART:

Q. Do you know whether Mr. Welsh had stepped on this pulley or not?

R COPY

A. No, sir, I couldn't see. We had the windows closed
96 and I couldn't see his movements. It was dark and he had his lamp and of course all I watched was his lamp.

"That's all."

The defendant then called as a witness to testify in its behalf ENOS WILKINSON, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Wilkinson, I believe you were the engineer of this crew of which Mr. Welsh was conductor when he was injured?
A. Yes, sir.
Q. Did you see the accident happen?
A. I did not.
Q. What was the first thing that attracted your attention to the fact that there was anything wrong?
A. Mr. Ohldecker called my attention to stop.
Q. Was your engine moving at that time?
A. Yes, sir.
Q. About how fast?
A. Oh, about six miles an hour I should judge.
Q. And after Mr. Ohldecker called you did not stop your engine?
A. As quick as I could.
Q. Did you get down from your engine?
A. I did. They had him picked up again I got down. They all got down ahead of me.
Q. You say he was picked up when you got down?
A. Yes, sir.
97 Q. Mr. Wilkinson, do you remember whether or not it was snowing?
A. It wasn't snowing at that time.
Q. What is that?
A. It wasn't snowing at that time.
Q. At the time of the accident, had it been snowing prior in the evening?
A. I couldn't say.
Q. Where was Mr. Welsh when you got out—you say they had picked him up?
A. Walking to the yardmaster's office when I got down off the engine.
Q. Did you notice where your engine was standing when you got out?
A. No, sir, I did not.
Q. Were you on the lead track or main track?
A. Well, I don't know.

Cross-examination.

By Mr. STEWART:

Q. Mr. Wilkinson, how far did your engine run after you were told to stop?
A. Why just about the engine length I should judge.
Q. The engine length do you mean the length of your locomotive and tender?
A. Yes, sir.
Q. You didn't see Mr. Welsh picked up did you?
A. No, sir.
Q. He was already up when you——
A. Yes, sir.
Q. When you got out?
A. Yes, sir.
Q. Do you know where your locomotive stopped with reference to the little office?
A. No, I couldn't say.

98 Redirect examination.

By Mr. MANCHESTER:

Q. Was this your regular run?
A. Yes, sir.
Q. How long had you been working on this run with Mr. Welsh?
A. Oh, I should judge three months, anyhow.
Q. Were you working nights all that time?
A. Yes, sir.

"That's all."

Defendant then called as a witness to testify in its behalf C. C. THORPE, who being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Thorpe, I believe you were the fireman of this crew?
A. Yes, sir.
Q. Where were you when the accident happened?
A. I was standing in what we call the deck.
Q. Did you see Mr. Welsh hurt?
A. No, sir.
Q. What was the first thing that indicated to you that anything was the matter?
A. Mr. Ohldecker hollered to the engineer to stop.
Q. About how fast was the engine moving at that time?
A. I judge five or six miles an hour.
Q. Did you get down off the engine?
A. Yes, sir.
Q. Where was Mr. Welsh when you got off?

R COPY

A. Mr. Ohldecker was assisting him to his feet.

99 Q. I will hand you this photograph marked "Exhibit A" and ask you if you are able to indicate where Mr. Welsh was when you got to him?

A. I think that is about it.

Q. Where the red cross is?

A. Yes, sir.

Q. Did you have any difficulty in seeing that interlocking pulley and device there?

A. Probably wouldn't look for them at that time.

Q. You didn't pay any particular attention to them?

A. No, sir.

Q. Mr. Thorpe, what is the fact as to whether or not it was snowing at the time, Mr. Welsh was hurt?

A. My recollection is it wasn't snowing at that time.

Q. Had it been snowing previously?

A. There was snow on the ground, yes, sir.

Q. How long had you been on this run with Mr. Welsh?

A. I couldn't say; I have no idea at all how long.

Cross-examination.

By Mr. STEWART:

Q. The snow was about four inches deep was it Mr. Thorp?

A. That is my recollection.

Q. Did some of it fall the evening of the accident?

A. Well, it fell that day—I wouldn't say when it quit.

Q. You don't know whether it quit snowing in the evening or not?

A. No, sir.

Q. Did it snow the greater part of the afternoon of that day?

A. I think so.

Q. You don't now recollect whether it snowed that night or not in addition to the afternoon?

A. No, sir.

100 Q. You don't know of anything now that would refresh your memory as to whether it snowed or not that night, do you?

A. No, sir.

Q. It might have snowed and you forgotten about it?

A. It may have.

Q. You don't undertake to mark down every time it snows in your mind do you?

A. No, sir.

"That's all."

The defendant then recalled for further examination EDWARD BLAUSER, who testified as follows:

Redirect examination.

By Mr. MANCHESTER:

Q. I will hand you this photograph marked "Plaintiff's Exhibit A" and ask you to indicate on it, if you are able to, the point where Mr. Welsh was lying?

Plaintiff objected.

COURT: He may look at the picture and tell us where he was with reference to the pulley.

A. He was lying close to that west pulley there—the pulley furthest west.

Q. How close was he?

A. Two or three feet.

Q. Which side?

A. West of the pulley.

Q. West of the pulley?

A. Yes, sir.

COURT: Two or three feet west of the pulley?

A. Yes, sir.

101 "That's all."

The defendant then called as a witness to testify in its behalf WILLIAM H. WILLIS, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. What is your full name, Mr. Willis?

A. William H.

Q. Where do you live?

A. Nutley, New Jersey.

Q. What is your business?

A. Signal engineer.

Q. Are you employed by the Erie Railroad Company?

A. Yes, sir.

Q. How long have you been in that business and in that particular department of the service?

A. Been in the signal business since July 1st, 1889, and ever since; been in the capacity of signal engineer for about seven and a half years.

Q. Did you have anything to do with the installation of this interlocking system at Mosier?

A. I was not signal engineer when that was put in there. I was general inspector at that time.

Q. What were your duties as inspector?

A. To see that the installations were put in according to the standards—standard practice.

R COPY

Q. I will hand you this photograph marked "Plaintiff's Exhibit A" and ask you if that represents a portion of that system as installed at Mosier?

A. It does.

102 Q. Was it installed in that condition when you were here?

A. Yes, sir.

Q. Now I wish you would just go ahead and explain briefly to the jury, as plainly as you can, what this interlocking system is and what it is for and then tell us how this plant is constructed?

A. Well, the functions of an interlocking plant is to safeguard the public—the traveling public. Interlockings are usually put in where the conditions are such that the switches cannot be handled expeditiously and safely without the use of interlocking plant and when they are installed the best methods are followed out in all detail and this wire in question was the wire that operates the west bound main line signal. The wire comes out from the lead out at the front of the tower—across the tracks and turns between the east and westbound main track, running westward to the switch point which is the facing point switch of the westbound track and goes through what we call the bolt, which is connected with facing point switch, so that the switch must be set up against the stock rail tightly before the highspeed or main line signal can be cleared. It is put there in case anything goes wrong with the facing point—that the bolt lock will prevent the operator or signalman handling the signal from clearing the signal unless the switch point is tightly faced up against the stock rail. This wire is run down through the bolt lock and is connected to what we call the signal bar, through the bolt lock casting, and around the pulley and back and goes under the track to the south again and went down to a point opposite the westbound main line signal. Those bolt locks are placed as this one is on the

103 same switch timbers as the points are put on for the purpose of preventing any lost motion between the stock rail and the switch point and the bolt lock itself. If it was put on a foundation to one side or off of the timbers it could be easily moved by the operator in trying to get his switch over in case the signal bar didn't go back in place. There is slots put in the bars which match when the signal is normal so that he can get his switch over from normal to reverse position or vice versa. If they are put on separate foundation, and this signal bar shouldn't go back to place—he moves the switch out of position, and if he tries to make the other move he cannot do it because the bar of the switch has only three sixteenths clearance so it must be within three sixteenths of facing up or in alignment with the signal bar to allow the bar to go through so it is put on the timbers for that purpose—to keep it from getting out of alignment.

Q. Now, Mr. Willis, you had told us the purpose of the interlocking system and also have told us something about the details of its construction—now tell us just generally what it is—what all you have in connection with an interlocking system—are there switches?

A. Well, there is switches and facing points, lock—of course there is the rails, dwarf signals, high speed signals——

Q. How are all these switches and details operated?
A. All operated from the lever.
Q. The levers are where?
A. As a rule they are in the upper story of the interlocking cabin.
Q. In this particular case?
A. In this particular case they were.
104 Q. They are all controlled by one man?
A. Yes, sir.

Q. And what is the fact as to whether or not your interlocking system is so arranged that the switches must all be thrown in a given way—so that the switches can only be thrown in a given way so as to prevent trains coming in collision with each other?

A. Well, there is a system of interlocking and that is all arranged in a predetermined manner. When an interlocking is installed there is always a locking sheet drawn up. And there is bars running parallel with the machine that are moved with the lever and there is other locking bars engaged in little slots in the horizontal locking so that in giving—in attempting to give a main line train a signal—before the main line signal can be cleared all the switches of the main track either facing or trailing must be set for the main track.

Q. In other words before a main line train can pass this point must the signal be in a given position—must that train get a particular signal?

A. Well, the instructions are that no train shall pass the home interlocking signal in the stop position without orders or being piloted over by the leverman or somebody on the ground to go out and tell the engineman that the switches are all right for him to pass over.

Q. In other words then must the train men have the proper signal before they can pass this interlocking tower?

A. If they obey the rules, yes, sir.

Q. Well, now in order to put a signal in proper position to permit a train to pass, what does the man working the levers do?

A. Well, if they are not lined up for the main track he
105 has to line them all up—set them all for the main track and lock them with the facing point lock.

Q. And in arranging the signal—giving the signal to the train so it can go through, what is the fact as to whether or not he at the same time and by the same movement lines up the switches so as to permit the safe passage of the train?

A. I don't know quite what you mean—referring to the connections?

Q. Yes?

A. Well, the switches and facing point locks are all operated by one inch pipe running from the cabin to the various switchpoints and locks.

Q. Assuming that a main line train comes up to the interlocking tower and the signal is against it, he is obliged to stop, is he not?

A. Yes, sir, to obey the rules.

Q. Now, in order to give it the signal to go ahead, what does the operator do?

OR COPY

A. Pulls the lever.
Q. What does that do?
A. Clears the signal.
Q. Does he do anything else—what about the switches?
A. Depends on the position—if the train comes there to make a main line movement they may be lined up for the main track which would not require the operator to do anything than pull the main line signal.
Q. Is it possible for the train to go through with the interlocking system until both the signals and switches are right?
A. It is possible for them to overrun the signal.
Q. I mean if they obey the signal?
A. I think they would stop at that signal.
Q. Now Mr. Willis, what then, is the purpose of these levers and wires and pulleys?
A. For operating the signals.
106 Q. Are they all connected with these levers up in the tower?
A. Yes, sir.
Q. And is that the standard method of constructing interlocking devices?
A. It is.
Q. When was this system installed, do you remember?
A. Well, I couldn't tell you the exact year it was installed.
Q. You were employed here then as general inspector?
A. Yes, sir.
Q. What is the fact as to whether the system is now as shown by the photograph in the same condition as it was when installed?
A. In the same condition.
Q. Were those wires or pulleys boxed when the system was first installed?
A. Yes, sir.
Q. The wires which run down alongside the track?
A. You say were boxed.
Q. Were they boxed?
A. Oh, no, these were never boxed.
Q. What is the fact as to whether in any of these interlocking systems such as is here used at the Mosier yard and wires are boxed and covered anywhere on the Erie system?
A. I don't know of any points at the present time where they are boxed. It was the custom years ago to box them, not to prevent people from getting onto them but to, what we thought at that time was for the safe protection of the signals. We thought they would be better maintained by boxing them, but we found that the pipes rusted up and could not be inspected and the dirt would pile up around the pulleys and the rats would scratch up dirt around
107 the pulleys and carry in rubbish of all kinds and make nests and in very many cases the pipe at the joints would pull apart on account of insufficient inspection so that all the boxing was done away with. That has been several years ago and no plants are boxed in excepting in station platforms and very very rarely

they are put in at station platforms where the public expect to travel.

Q. It was on account of this trouble that you had with these systems that you stopped boxing the wires?

Plaintiff objected.

A. It was.

Objection withdrawn.

Cross-examination.

By Mr. STEWART:

Q. Do I understand you to say that none of your plants or interlocking devices that are in the center of the track across the track are boxed in the city here?

A. I have no recollection of any being boxed.

Q. Have you had charge of putting them all in?

A. Well, in a general way. Of course, I don't go into the little details. I can't do that.

Q. Have you noticed your interlocking devices that are on your tracks running east of Watt Street or toward the Valley Mill?

A. I don't know just where that is. I am not familiar with the Valley Mill.

Q. Well, going eastward on the Sharon division?

A. You say the Sharon—the main line?

Q. Yes, aren't there lots of interlocking devices crossing the tracks going along there in connection with the Lake Shore Railroad?

A. In Valley Street?

108 Q. Yes?

A. We have, but that is a different kind of interlocking entirely.

Q. But you cross and recross the tracks with it and runways?

A. That is electric interlocking—rubber covered wires—they are not mechanical connections.

Q. They are wires?

A. Yes, but they don't move.

Q. They are wires from—they are stationary wires?

A. They are covered for their own protection.

Q. They are only covered for the wires' protection, not for the protection of the men who use this runway?

A. Oh, no.

Q. They are not considered?

Defendant objected; sustained.

Q. Now, this particular wire here that we speak of running over to the dwarf signal, two small wires running along here, you notice them do you?

A. Yes, sir.

Q. You say those kind of wires you used to cover and put in a pipe?

A. Years ago.

R COPY

Q. And then you stopped putting them in a pipe because you couldn't inspect the wires you say?

A. Yes, sir.

Q. There wouldn't be any trouble to cover that over with a board would there, to let men walk?

A. Any covering put over there it allows the rubbish to collect under there.

Q. But they can easily be taken off if you have a strip with boards crosswise there to hold it down?

A. Yes, but it is rubbish getting in there; it fouls the signals—very dangerous to do that.

109 Q. Covered over with proper inspection.

A. It doesn't get proper inspection when it is covered.

Q. But if it was just covered over with a board it would be easily inspected?

A. Well, where you put boards down in a case like that they have to be pretty securely fastened and they don't get taken up as often as they should.

Q. If they were taken up as often as they should be to make the inspection it would be all right?

A. Well, there is no certainty whether it would or not.

Q. True, but I said if they were taken up as often as they should be there would be no difficulty in making the inspection?

A. There would be no difficulty in making the inspection, but they wouldn't work as well or as safely as if they were uncovered.

Q. Why wouldn't it work as well if it were covered? There would be nothing to cause any friction, and below the top of the tie level what would stop it from working?

A. I don't know as anything would stop it from working.

Q. It would work, wouldn't it?

A. Yes, sir, it may.

Q. It runs under the rails?

A. Yes, sir.

Q. The wire could run under the board just the same, couldn't it?

A. Yes, sir.

Q. And if a board were put over that it would be mighty easy thing for a man to walk along there safely, wouldn't it?

A. Well, I don't know as it would make it much safer.

Q. At least, if there was a board over the top he couldn't get his foot caught in the wire?

A. He might trip over the board.

110 Q. But I am speaking about the wire, if there was a board over the wire he couldn't trip over the wire?

A. No, sir, he couldn't very well.

Q. And where the board—if it was boxed in like these 2 x 4s you use over here on Valley Street and these wires run under and you put planks right over the top of it——

A. We don't allow any boxing to be done on wires—no mechanical wires.

Q. But I am saying it could easily be done?

POOR

A. No, sir, it could easily be done, but we don't do that.

Q. And you could protect the traveling public and your traveling employes as well by putting a board over there?

A. A board is not boxing.

Q. All right, put a board over there and nail a board down alongside like that, put one board over and nail one down alongside?

A. Perhaps a board could be put over, but that would not be tubing or boxing.

Q. What is the difference between the names so long as it answers the same purpose?

A. Quite a difference.

Q. The board would be easily handled, easily put down and taken up if you had that much thought about the men working along there?

A. Well, our experience proved that the boards were not taken up as often as they should be.

Q. That was because someone did not do his duty?

A. Oh, no, wherever there is board or anything over the wires and the wind is blowing, papers or anything, they always stop and get under the board and into the pulley.

Q. There is no pulley—here is your pulley there covered with a board, you have covered your pulley already?

111 A. If you put another board there everything stops there and is carried right under there with the wires.

Q. Your pulley is easily seen, right between the ties, the men don't walk there, I am talking about this space there where the men walk?

A. I understand—if a board is put over there then there is a little gully through there on account of the wires being lower than the ties. If you put a board over the ties you box in that little gully and everything that comes along settles in there, and as these wires run back and forth they pull it in.

Q. This pulley here isn't connected with these wires that run across?

A. No, but there is pulleys under this board.

Q. Those pulleys are covered?

A. No, sir, they are not.

Q. Isn't that a board there?

A. The pulley is nailed on the side of the board.

Q. Isn't it under the board?

A. No, sir, not exactly.

Q. Isn't it?

A. No, sir, it is on the side of it.

Q. Will you show me the pulley there?

A. Well, the camera wasn't quite sharp enough to get all the details.

Q. The camera wasn't quite sharp enough to get the pulley on the side?

A. No, sir, it is there, but you don't see it.

Q. Well, then, if you put your boxing or board over here to the

COPY

end of the ties to make this the same walk you could easily reach under there to get a paper?

112 A. Well, it is too late then to pull it out after it has done the damage.

Q. You can inspect it easily?

A. We cannot afford to keep an inspector there to pull out paper that might blow in any minute.

Q. Do you think there is much danger of it blowing in any minute and that you would have to have some person there to watch it?

A. Yes, sir, lots of times.

Q. What is to prevent it blowing in there now?

A. It is open and passes right along.

Q. This pulley wheel could be placed over near the rail—you could put your pulley wheel over a little further? You put it up there because you keep it open—it could easily be put nearer the rail than there?

A. Well, the conditions would be about the same.

Q. Well, there is a board on top of the tie under which the wire runs?

A. There is a cleat there for the purpose of fastening the pulley onto.

Q. Then, if you would run a board from this cleat over to this cleat with a 2 x 4 in front and behind it, there would be no danger of anything blowing in from the east or west?

A. Certainly would.

Q. How could it if you had it boxed in at the east and west?

A. Gets in in various ways.

Q. It would only get in from the north and south if it was boxed from the east and west, wouldn't it?

A. (No response.)

Whereupon court suspended until 8:30 A. M. of the following day, to-wit: November 28th, 1911, at which time the trial of this case was continued as follows:

113 Redirect examination.

By Mr. MANCHESTER:

Q. Something was said yesterday about some wires I believe that were near Watt Street being covered, am I right as to the location?

A. Well, I don't know about Watt Street. I always knew that place as Himrod Junction.

Q. What kind of wires are those?

A. Well they are mechanical wires there, number nine steel wire.

Q. Well, these wires that were spoken of as being covered—electrical wires?

A. At this particular point?

Q. Yes?

A. Well, I don't know of any wires there excepting the mechanical connection, otherwise number nine steel wire.

POOR

Q. I am referring to the electrical wires which you spoke of yesterday?
A. That is between Oak Street and Valley Street.
Q. Well, I had the wrong interlocking system—I believe you spoke of those wires being boxed or covered?
A. Yes, sir.
COURT: That is, insulated?
A. Yes, sir, that is an electrical interlocking system.
Q. Now, take these wires at Mosier—are they electrical or mechanical?
A. Mechanical.
Q. By that you mean the wires themselves move back and forth?
A. Yes, sir.
Q. And by that means move the switches?
A. Yes, sir.
114 Q. While these electrical wires, all that passes through them——
A. Just the electrical current for operating the motors.

"That's all."

The defendant then called as a witness to testify in their behalf M. C. COSTLEY, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Costley what is your business?
A. Signal supervisor.
Q. For what company?
A. Erie Railroad.
Q. How long have you been engaged in that business?
A. Eighteen years.
Q. Where are you located,—what part of the Erie system do you have under your jurisdiction?
A. Mahoning Division.
Q. Were you here when the interlocking plant at Mosier was installed?
A. Yes, sir.
Q. What were you doing then?
A. I was foreman of construction.
Q. What if anything did you have to do with the construction of that plant?
A. I was foreman of the construction of that plant.
Q. When was it put in?
A. In May and June of 1905.
Q. Now just tell the jury briefly how that plant is constructed and what the purpose of it is Mr. Costley, making it as plain
115 as you can?
A. Well there is a machine in the tower,—levers by which one man is able to control the switches and signals from the tower. The levers are connected to the switches by one inch pipe and to

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the signals by number nine steel wire. The general purpose is to provide a safe means for movement of trains over the system of switches and indicate to the train that the switches are right for that movement.

Q. Assuming Mr. Costley that you have a main line train approaching this interlocking plant, is it necessary that it receive a certain signal before it be permitted to pass?

A. Yes, sir.

Q. Under the rules of the road?

A. Yes, sir.

Q. Now with an interlocking system such as this is it possible for the man in the tower to give a train its signal permitting it to go on through if the switches are not properly lined up?

A. No, sir, it is not.

Q. So that now when the switches are set for the use of the main track either way what is the fact as to whether or not all the other switches are locked?

A. Well all in conflicting routes are locked.

Q. And is that where the system gets its name?

A. That is where the system gets its name and that is the point wherein the safety lies.

Q. That is in order to set the switches for one route then are all other switches leading into conflicting routes locked?

A. Yes, sir, they are locked.

Q. Now what then is the object and the need for all these wires and pipes and levers,—what purpose do they serve?

116 A. Well they enable the operator or leverman in the tower to handle and control the switches and signals.

Q. That is by moving the lever?

A. By moving the lever in the tower.

Q. Does that pull the wires?

A. The lever operates the wires and transmits the power of the man through the wire to the signal.

Q. What is the fact as to whether or not those wires serve the same purpose as for instance the rod leading from the brake handle of a wagon back to the brake itself?

A. Practically the same purpose—the wires move when the leverman's strength is applied to the lever.

Q. What is the reason Mr. Costley that those wires are not boxed and covered?

A. For the general purpose that the machinery is in better condition if it is not boxed and is better taken care of.

Q. What is the fact as to whether inspection is easier,—more thorough,—if the wires are not covered?

A. Well inspection is much easier. It is apparent to the eye at any time.

Q. If the wires are boxed in and covered then in case a wire should break at some place what is the fact as to whether or not you experience or would experience difficulty in locating the place and making repairs and thus delay the movement of trains?

A. We do experience considerable difficulty,—I have been through

all that and it is very difficult to locate the trouble and more time is usually spent in finding the trouble than making the repairs afterward.

Q. What is the fact Mr. Costley as to whether that is the standard type of interlocking system?

A. Yes, sir.

117 Q. And what is the fact as to whether the wires at this plant have ever been boxed?

A. This plant has never been boxed.

Q. It is now in the same condition as when it was constructed by you?

A. Yes, sir.

Q. Has it been so all the time?

A. Always the same.

Cross-examination.

By Mr. STEWART:

Q. Mr. Costley in this system you have at the Brier Hill yards there is not very much of a wire or your apparatus in the runway there between the two tracks doesn't cover very much space does it?

A. No, sir.

Q. I will call your attention to some piping on the South side of the track (indicating on photo),—what goes through those wires?

A. Nothing.

Q. Most of your interlocking work is on the outside or either sides of the track?

A. When it is possible.

Q. If the wire running from the tower Northward across the tracks to the dwarf signal, meaning these two small wires, shown in picture marked "Exhibit A," if that were covered over the runway there wouldn't be much difficulty in finding where that wire was broken if it should happen to break?

A. It would be more difficult than if it was boxed.

Q. Why would it be more difficult when you would only have about two or three feet of wire there and your signal man would know the very moment the signal didn't respond to the pull of the lever?

A. That much would be concealed from view.

118 Q. That isn't enough to cause any difficulty, about a couple of feet, if the wire would break it would fall limp?

A. It would go slack.

Q. That wire is drawn across there tightly so that there is enough tension to keep it from lying on the ground?

A. There is a slight tension to it.

Q. Enough to keep it from falling on the ground here in this runway?

A. No, sir, it is supported.

Q. Supported across that runway there?

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A. Yes, sir.
Q. Then if the wire should break it would fall upon the ground on either side wouldn't it?
A. Yes, sir.
Q. That could easily be seen?
A. Yes, sir.
Q. It could be seen lying on the ground there just as easily as it could be seen in the middle of the runway?
A. You could see it.
Q. It runs all the way across there and is in an exposed condition so that it could be inspected right along and the inspector would know whether or not the wire was broken or not if that runway was made safe, couldn't he?
A. A man could find it.
Q. He could easily see it if he was an inspector looking for it and that was his business, couldn't he?
A. He could see it.
Q. Easily see it, I say?
A. Not under the plank.
Q. But he could see the wire was broken because it would be lying on the ground limp?
A. He would know that if the signal didn't respond.
Q. He would know it if his business was to inspect and not work in the tower?
A. Naturally.

"That's all."

119 Defendant then called as a witness to testify in its behalf RICHARD CONDON, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Condon what is your business?
A. Yardmaster.
Q. Were you yardmaster at Mosier yard at the time Mr. Welsh was injured?
A. Yes, sir.
Q. Were you on duty that night?
A. Yes, sir.
Q. Are you able to tell where the car was bound for which Mr. Welsh and his crew took down to, near Holmes Street I believe?
A. Yes, sir, it was a New York car and going to New York.
Q. Going to the state of New York or the City of New York?
A. State.
Q. You mean somewhere in the state of New York?
A. Well all I know it was going to New York, that is where it was billed, for New York.
Q. What were the next cars that were to be moved by the crew?

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and what were the orders you would have given to Mr. Welsh had he come into the yard office at the time he started?

A. I was going to give Mr. Welsh orders to make this train up for Sharon.

Q. What is the fact as to whether or not those were the next orders which you gave to the crew after the accident?

A. Yes, sir, I gave the crew the same orders.

120 Q. Now just go ahead and tell the jury how this train for Sharon was to be made up under the orders that you have spoken of and how it was in fact made up that night?

A. You want me to tell the jury the orders I was supposed to give Mr. Welsh?

Q. Yes.

A. Well Mr. Welsh would come into the office and I would give Mr. Welsh orders——

Plaintiff objected.

Q. I mean right at the time of the accident?

The plaintiff objected to what he might have said or done.

Q. I am asking him now to tell us how that train for Sharon was in fact made up,—how it was made up under the orders he gave.

A. Well the Hubbard freight was supposed to be first out then came Sharon freight, then South Sharon and then cars for New Castle and that was the order of the train.

Q. That was on this night?

A. On number three track.

Q. That was on this night?

A. Yes, sir.

Q. And at the time Mr. Welsh was injured?

A. Yes, sir.

Q. Now I wish you would detail a little more fully just the character, the switching that is done by this crew?

A. In the yard you mean?

Q. Yes.

A. Well they get orders in the evening as to what switching they have got to do. They go up into the new yard as a rule and the first thing they clean out the new yard,—clean up all the switching. There was none on those tracks for the East,—they

121 were all West bound. They then take and do some switching on what is called number seven and number nine and number ten,—straighten those tracks out,—next thing that they do is to take this caboose down and of course if there was another car for freight 176, that is a New York car, why of course they would take that down too,—with the caboose.

Q. And in this work what is the fact as to whether the cars and freight handled were destined for various points in different states?

A. Well yes, I suppose they would be going to different points. Of course there is Sharon and New Castle and Cleveland and just as they,—of course after they leave Cleveland we don't know anything more about them. Of course there is quite a number of cars for the main line West as far as Chicago.

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Q. Mr. Condon I believe you said the next work which was done by this crew immediately following Mr. Welsh's injury was making up of this Sharon train?

A. Yes, sir.

Q. That is Sharon, Pennsylvania?

A. Yes, sir.

Q. Now Mr. Condon, you remember whether or not it was snowing at the time Mr. Welsh was injured?

A. Well now I know it was snowing in the evening and I think it was snowing after nine o'clock, but I don't remember whether it was later than that. It was blowing a little and there was, I think, a good deal of snow on the ground I should judge three or four inches.

Q. What is your recollection as to whether or not it was snowing at the time of the injury?

A. Well I don't think it was snowing at that time.

122 Q. Mr. Condon, how long have you been yardmaster?

A. Well I was yardmaster at Brier Hill close on to two years. I will be going on three years yardmaster now.

Q. Let me hand you photograph marked "Plaintiff's Exhibit A" and ask you if that correctly represents the yard office the tracks in front of it and the portion of the interlocking system shown?

A. Yes, sir.

Q. Are you acquainted with the interlocking system, the way it is constructed and the way it operates?

A. Well yes I know the way it is constructed but I don't know very much about the interlocking.

Q. I am not asking you about the principles of the way the thing is operated,—I am asking you to tell whether that is a proper representation of the system the way you have seen it?

A. Well yes, it is.

Q. And has it been in that condition all the time that you worked there as yardmaster?

A. That same plant?

Q. Yes.

A. Yes, sir.

Cross-examination.

By Mr. STEWART:

Q. Mr. Condon, this work in the Brier Hill yards consisted largely of the making up of trains and distribution of the cars of trains that arrived there?

A. Well, yes, some but not altogether making up so many trains; we didn't make so many trains, of course that number three was for making up trains.

Q. Trains would arrive with cars for various plants in the city and various persons and you folks would send them out of the yard to the person?

A. Yes, sir.

123 Q. To whom it was consigned?

A. Yes, sir.

POOR

Q. And then you took care of and handled local for Youngstown and vicinity freight and also made up trains that went East and West?
A. Yes, sir, part of it.
Q. Part of the train which would go East and West?
A. Yes, sir.
Q. And where was the other part made up?
A. At the west end of the yard.
Q. West end of the Brier Hill yard?
A. Yes, sir.
Q. Where were you working, at what end of the Brier Hill yard?
A. Well I was working at both ends for a while and last year or so they had two yardmasters there, one at the West and one at the East end.
Q. How many yardmasters did you have there the night Mr. Walsh was hurt?
A. Two.
Q. How big is that yard when I say Big I refer to length,—how long is it?
A. Well the yard itself is probably over a mile long. Of course if you would go outside of where the yardmaster is located it would be longer than that; it would be about, East end to West end I should judge would be a mile.
Q. You say that you thought it snowed that night after nine o'clock?
A. Well I thought it was snowing about nine o'clock or after nine.
Q. And your recollection is that it ceased snowing before,——
A. Yes, sir, I think it ceased snowing before nine or ten o'clock, I am sure of it.
Q. And there was a high wind blowing?
A. Well the wind was blowing, yes, sir,—the snow had,—
124 it had snowed I guess, I don't know, along in the evening before I got out but it was snowing when I went to work.
Q. There was snow about the time of this injury about four inches?
A. About three and a half or four inches, something like that.

"That's all."

The defendant then called as a witness to testify in its behalf R. C. WHEELER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Wheeler you live in this city?
A. Yes, sir.
Q. And are Division Claim Agent of the Erie Railroad?
A. Yes, sir.
Q. I will ask you, Mr. Wheeler if following this accident to Mr. Welsh you made an investigation of the facts?
A. I did.

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Q. Whether you took statements?
A. Yes, sir.
Q. I will ask you whether or not you interviewed Mr. Welsh?
A. Yes, sir.
Q. Did you take a written statement from him?
A. I did.
Q. Just tell the jury what you did in taking that statement?
A. Why I think it was two days after the accident. I called on Mr. Welsh in the city hospital and asked him the facts about
125 the accident and he told me and I wrote it down as he told me and he read it over, said it was true, and signed his name.
Q. Mr. Wheeler this is written in your handwriting I believe?
A. Yes, sir.
Q. Did you ask questions, did I understand you to say?
A. Yes, sir.
Q. Then does this embody the substance of what he told you in answer to your questions?
A. Yes, sir.
Q. What is the fact as to whether or not you have endeavored here to write out what he told you just as he did tell it to you?
A. Yes, sir.
Q. And as you understood it?
A. Yes, sir.
Q. Now I will hand you this statement which has been marked "Defendant's Exhibit 1" consisting of three sheets, number- one, two and three, each bearing date of March 9th, 1911, bearing at the end of each sheet the name "T. J. Welsh" and also appearing to have been signed in the presence of yourself and I will ask you whether that is the statement to which you refer?
A. Yes, sir.

Mr. MANCHESTER: We offer this statement in evidence, your honor.

Cross-examination.

By Mr. STEWART:

Q. Anybody present when you took this statement?
A. I don't think so.
Q. No doctor there?
A. Why not in the immediate presence.
Q. No nurse in the immediate presence?
A. Not that stopped there; they may have passed back and forth.
126 Q. None who paid any attention to what you were doing?
A. No, I don't think so.
Q. You had no witness there to sign this except yourself?
A. No, sir.
Q. He was hurt on the 7th and you got there on the 9th, what time of the day was it?
A. It was sometime in the afternoon,—I don't remember exactly the hour.

POOR

Q. At the time you took this statement did you know anything about the extent of his injury, you knew his arm had been smashed?
A. Why, yes, in a way.
Q. Why didn't you wait a few days till the man got in shape so he would be free from pain and dope?
A. He appeared to be all right when I took his statement.
Q. Did you know he was being doped with morphine at the time to dispel the pain?
A. No, I didn't.
Q. At the time you talked to him did he seem free from pain?
A. Why apparently, yes, sir.
Q. Who was his doctor?
A. I think Doctor Buechner.
Q. Doctor W. H. Buechner, the road surgeon?
A. Yes, sir, either he or Welsh but I am quite sure it was Buechner.
"That's all."

Whereupon defendant rested.
And thereupon the plaintiff to rebut the evidence offered by defendant offered himself as a witness to further testify in his own behalf, and testified further as follows:

127 *James T. Welsh.*

Direct examination.

By Mr. STEWART:

Q. Mr. Welsh when you found yourself thrown in the works of the locomotive what did you do to protect yourself?

Defendant objected.

COU-T: Ask him directly whether after he took hold of the connecting rod,——
Q. When you got hold of the connecting rod were you dragged any distance?
A. Why it went around about once.
Q. What do you mean went around—the wheels?
A. The wheels, when I was thrown under the engine or into the side of the engine I grabbed with my right arm around the connecting rod or what they call the driving rod and carried me,—I threw myself out, pawed with this arm to get out.
Q. You said there was about,—you think it was about a revolution of the wheel?
A. It was just the distance from where this wheel is to where I was picked up.

Defendant objected to answer; sustained.

Q. Well about how far do you estimate?
A. Between ten and thirteen feet.
Q. Mr. Welsh I show you a statement marked "Defendant's Exhibit number one"?

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A. I know nothing of any statement given to any person only the statement I gave to you. The truth I will tell and that is all.

Q. Let your answers respond to my questions and then we will take less time, I want to show you a statement and look at it, in three pieces.

A. I heard this gentleman read it over yesterday afternoon.

128 Q. I just want to show it to you, did you ever read that statement over in the hospital?

A. No, sir.

Q. Or at any time?

A. No, sir.

Q. Do you remember, let's see, on the 9th day of March reading over any statement to Mr. Wheeler, the claim agent or any other person and telling him it was true?

A. I never mind of seeing or reading over anything while I was in the hospital or out of the hospital to any person.

Q. I believe you say you didn't have any recollection of signing your name to this paper?

A. No, sir.

Cross-examination.

By Mr. KENNEDY:

Q. Mr. Welsh write your name for me will you?

A. (Witness writes his name.)

Q. You think you have a recollection now of throwing your arm, your right arm around the connecting rod?

A. Yes, sir.

Q. Was that connecting rod attached to the driving wheel, the connecting rod of the driving wheel?

A. Yes, sir.

Q. Where is that connecting rod attached to the driving wheel,—how near to the center of the wheel or the circumference of it?

A. Why about on the quarter.

Q. What is the diameter of that wheel?

A. I don't know.

Q. I suppose you know something about it,—can you give us approximately the diameter of that driving wheel on the engine?

A. No, sir.

129 Q. Don't you know whether it was three feet or five feet?

A. No, sir.

Q. Haven't any idea about it?

A. No, sir.

Q. Can't tell me whether it was two feet or ten feet?

A. No, sir.

Q. You mean that do you Mr. Welsh?

A. I mean that I don't know. I know it is not ten but I don't know whether it is three or not.

Q. Well do you know it was more than three?

A. I don't know whether it was more than three or less than three.

POOR

Q. You don't know whether the driving wheel on that engine is less than three feet in diameter?

A. No, sir.

"That's all."

Whereupon plaintiff rested his case.

Defendant at the conclusion of all the evidence renews its motion to arrest the testimony from the jury and direct a verdict in favor of the defendant upon the grounds as then stated and upon the further grounds as follows, towit:

First. That plaintiff has failed to show a cause of action against the defendant under the law and the evidence.

Second. That plaintiff has not proven that defendant was guilty of any negligence.

Third. That the evidence shows that the accident was the result of plaintiff's own negligence.

Fourth. That the evidence shows that plaintiff was guilty of negligence which directly contributed to bring about his injuries.

130 Fifth. That under the provisions of the Employers' Liability Act of Congress of April 22, 1908, defendant claims a privilege and immunity from liability herein.

Sixth. That under the evidence plaintiff assumed the risk under the provisions of the Employers' Liability Act of Congress of April 22, 1908.

Seventh. And upon all other proper and legal grounds.

The counsel for the respective parties at this time submitted to the court requests to charge before argument as follows:

Requests to Charge.

Plaintiff asks the court that the following requests be given separately, and not as a series, before argument:

1.

If you find from the evidence that the place where plaintiff was injured was a way or place where employees were accustomed to work and walk in the discharge of their duties to the defendant company, and that said way or place was unsafe or dangerous by reason of the location of an unguarded pulley wheel therein and unguarded wires being strung across the same or either, then I say to you as a matter of law, the defendant company was guilty of negligence. (Refused.)

2.

It was the duty of the defendant company to furnish and maintain the way or place where plaintiff was obliged to walk and work, in the performance of his duty, in a safe condition, and if you find by a preponderance of the evidence in this case that the defendant

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failed in its duty in this respect, and that such failure was
131 a proximate cause of the injury sustained by plaintiff, as claimed by him, your verdict should be for the plaintiff, and he should receive full compensation for his injuries, provided you find he was in the exercise of ordinary care on his part. (Refused.)

3.

It was the duty of the defendant company to furnish and maintain the way or place where the plaintiff was obliged to walk or work in the performance of his duty in a safe condition, and if you find, by a preponderance of the evidence in this case that the defendant company failed in its duty in this respect, and that such failure was a proximate cause of the injury sustained by plaintiff, your verdict should be for the plaintiff, even though you may find he was guilty of negligence contributing to his own injury, provided you find his contributory negligence was slight and the negligence of the defendant was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of the negligence attributed to the plaintiff. (Refused.)

4.

You are instructed that the plaintiff had a right to expect that the defendant company, at the time of his injury, would provide and maintain the ways about where plaintiff was performing his duties in a safe condition, and that said company would use ordinary care and caution not to use appliances in and about the ways connected with its business which might prove a trap or pitfall that might result in his injury. (Refused.)

132 5.

In determining whether the plaintiff was negligent as alleged by the defendant company, it is proper for you to consider the time of day or night when the accident occurred, the condition of the weather, the unguarded pulley wheel, the unguarded wires and their location, whether the pulley wheel and wires were concealed by snow, and all of the surroundings relating to his injury as alleged by him in his petition or shown by the evidence. (Refused.)

Defendant's Request to Charge.

First. At the conclusion of all the evidence in the above entitled action, the defendant asks the court to arrest the testimony from the jury, and to direct the jury to return a verdict in favor of the defendant. (Refused.)

Or, if the court should refuse so to charge, then the defendant asks the court to charge the jury as follows:

Second. The court says, as a matter of law, that at the time plaintiff sustained the injuries complained of in this case, the defendant

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was engaged in interstate commerce, and plaintiff was employed by it in such commerce; that by reason thereof, the rights and liabilities of both of said parties are, and were at the time, fixed and determined by an act of the Senate and House of Representatives of the United States of America in Congress Assembled, approved April 22nd, 1908, entitled "An act relating to the liability of common carriers by railroads to their employees in certain cases," and commonly known as "The Employers' Liability Act of Congress of April 22nd, 1908"; that under said Act, plaintiff being familiar with and fully understanding the nature and method and
133 manner of construction of the appliances with which, and the places in which he was employed, and the dangers and hazards incident thereto, assumed the risks thereof, and cannot recover in this case. (Refused.)

Or, if the court refuses to charge the jury, as above requested in either request First or Second, then defendant asks the court to give each of the following requests before argument, separately, and not as a series.

(Both of the above requests were refused.)

Third. If you find that plaintiff was injured while defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, your verdict must be for the defendant for the reason that the Employers' Liability Act of Congress of April 22nd, 1908, applies, and is exclusive of all legislation by the State of Ohio, and the rights of the parties in this action are determined by said Act of Congress, and under the provisions thereof, plaintiff assumed the risks incident to the situation of his employment and injuries, and cannot recover. (Refused.)

Fourth. If you find that at the time of plaintiff's injuries, the defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, and if you further find that while so engaged, and prior to and at the time of receiving his said injuries, the plaintiff had knowledge of the character of the interlocking device, and the rails, tracks, place of work, and appliances generally connected with his said accident, and knew and understood the method and manner of construction thereof, and knew and appreciated the dangers and hazards incident thereto, and
134 incident to his said employment in such situation, he cannot recover in this case, and your verdict must be for the defendant for the reason, that under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, he, in such situation, assumed the risks, and your verdict must then be for the defendant. (Refused.)

Fourth A. If you find that at the time of plaintiff's injuries, the defendant was engaged in interstate commerce, and if you further find that while so engaged, and prior to and at the time of receiving the said injuries, the plaintiff had knowledge of the character of the interlocking device and the rails, tracks and place of work, and appliances generally connected with his said accident, and knew and understood the method and manner and construction thereof, or in the exercise of due care, might have known thereof, and knew

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and appreciated the dangers and hazards incident thereto, and incident to his said employment in such situation, or in the exercise of due care might have known thereof, he cannot recover in this case, and your verdict must be for the defendant for the reason that under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, he, in such situation, assumes the risk. (Refused.)

Fifth. The court says to you, as a matter of law, that if you find that plaintiff was injured while defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, then the rights and liabilities of both of said parties are governed and determined by the act commonly known as "The Em-
135 ployers' Liability Act of Congress of April 22nd, 1908," and that said act is exclusive of any and all legislation by the State of Ohio on the same subject, and your verdict, so far as the law of this case is concerned, must be governed by said Federal Statute, as interpreted and explained to you by the court. (Refused.)

Sixth. The court says to you that the defendant in this action claims a privilege and immunity from liability herein for the reason that an Act of Congress commonly known as "The Employers' Liability Act of Congress of April 22nd, 1908," applies to the exclusion of any and all legislation of the State of Ohio on the same subject matter, and that such Federal Statute alone determines the rights and liabilities of the parties hereto, and the court therefore instructs you, as a matter of law, that if you find that the plaintiff in this action was injured while employed by defendant in interstate commerce, and while defendant was engaged in interstate commerce in the situation, and if you further find that plaintiff knew and understood the risks and hazards incident to his employment, and which resulted in his injuries, that he assumed the risks and cannot recover in this action. (Refused.)

Seventh. The defendant was not required to use the latest or best known appliance or appliances in the operation of its railroad, but was only required to exercise ordinary care to provide a reasonably safe place for plaintiff to work in, and to provide reasonably safe appliances with which, and about which plaintiff was required to work, and if you find that defendant discharged its duty in this respect, even though you may find that the appliances in
136 question were not the latest or best known appliances or devices, your verdict must be for the defendant. (Given.)

Eighth. If you find that plaintiff's injury was the result of a pure accident, your verdict must be for the defendant. (Given.)

Ninth. If you find that plaintiff's injuries were the result solely of his own negligence in failing to exercise proper care for his own safety in alighting from the engine and attempting to walk across the tracks and right of way, your verdict must be for the defendant. (Given.)

Tenth. If you find that plaintiff himself was guilty of negligence in his method and manner of alighting from the moving engine and attempting to walk across the tracks and appliances of defend-

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ant, and such negligence, on his part, directly contributed to produce his injuries, that fact must be taken into consideration by you, and even though you should also find that the defendant was negligent notwithstanding, the damages should be diminished by you in proportion to the amount of negligence attributable to plaintiff. (Given.)

Eleventh. The court says to you, as a matter of law, that plaintiff was himself guilty of negligence in his method of alighting from the moving engine and attempting to cross the tracks and interlocking appliances in question, and in the event you should find the defendant was negligent, the damages shall be diminished by you in proportion to such amount of negligence as you may attribute to plaintiff. (Refused.)

Defendant requests the court to charge the two last requests, that is the twelfth and thirteenth, in the event that the court
137 refuses to give the defendant the protection of the Federal Act known as "The Employers' Liability Act of Congress of April 22nd, 1908."

Twelfth. If you find, under the evidence, that the defendant was guilty of negligence, but also find that the plaintiff in and about alighting from the train, under the circumstances—if you should find that he did alight from the train—was guilty of negligence contributing directly to his injuries, and shall further find that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, then the plaintiff cannot recover. (Given.)

Thirteenth. If you should find, under the evidence in this case, that the defendant was guilty of negligence, but such negligence was not gross in comparison with the negligence of the plaintiff, then the plaintiff cannot recover; but if you shall find that the defendant was guilty of negligence, and that such negligence was gross in comparison with the negligence of plaintiff, then the damages which you shall give on account of the negligence of such defendant shall be diminished in proportion to the amount of negligence which you shall find, under the evidence, attributable to the plaintiff. (Given.)

Charge Before Argument.

Whereupon the court charged the jury before argument upon the law and issues joined herein, as follows, to-wit:

GENTLEMEN OF THE JURY: Preceding the argument a very few requests are given you which are in writing and are applicable
138 to some of the questions in the case. Following argument an oral instruction will be given you by the sitting judge and the two, together, will constitute the entire direction that you are given as to matters of law.

The defendant was not required to use the latest or best known appliance or appliances in the operation of its railroad, but was only required to exercise ordinary care to provide a reasonably safe place for plaintiff to work in, and to provide reasonably safe

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appliances with which, and about which plaintiff was required to work, and if you find that defendant discharged its duty in this respect, even though you may find that the appliances in question were not the latest or best known appliances or devices, your verdict must be for the defendant.

If you find that plaintiff's injury was the result of a pure accident, your verdict must be for the defendant.

If you find that plaintiff's injuries were the result solely of his own negligence in failing to exercise proper care for his own safety in alighting from the engine and attempting to walk across the tracks and right of way, your verdict must be for the defendant.

If you find that plaintiff himself was guilty of negligence in his method and manner of alighting from the moving engine and attempting to walk across the tracks and appliances of defendant, and such negligence, on his part directly contributed to produce his injuries, that fact must be taken into consideration by you, and even though you should also find that the defendant was negligent notwithstanding, the damages should be diminished by you in proportion to the amount of negligence attributable to plaintiff.

139 If you find, under the evidence, that the defendant was guilty of negligence, but also find that the plaintiff in and about alighting from the train, under the circumstances—if you should find that he did alight from the train—was guilty of negligence contributing directly to his injuries, and shall further find that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, then the plaintiff cannot recover.

If you should find, under the evidence in this case, that the defendant was guilty of negligence, but such negligence was not gross in comparison with the negligence of the plaintiff, then the plaintiff cannot recover; but if you shall find that the defendant was guilty of negligence, and that such negligence was gross in comparison with the negligence of plaintiff, then the damages which you shall give on account of the negligence of such defendant shall be diminished in proportion to the amount of negligence which you shall find, under the evidence, attributable to the plaintiff.

Plaintiff excepts to the refusal of the court to give his request number one before argument.

Plaintiff excepts to the refusal of the court to give his request number two before argument.

Plaintiff excepts to the refusal of the court to give his request number three before argument.

Plaintiff excepts to the refusal of the court to give his request number four before argument.

Plaintiff excepts to the refusal of the court to give his request number five before argument.

Plaintiff excepts to the giving by the court of defendant's request number seven, before argument.

140 Plaintiff excepts to the giving by the court of defendant's request number eight, before argument.

Plaintiff excepts to the giving by the court of defendant's request number nine, before argument.

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Plaintiff excepts to the giving by the court of defendant's request number ten, before argument.

Plaintiff excepts to the giving by the court of defendant's request number twelve, before argument.

Plaintiff excepts to the giving by the court of defendant's request number thirteen, before argument.

Defendant excepted to the refusal of the court to give to the jury its first request before argument.

Defendant excepted to the refusal of the court to give to the jury its second request before argument.

Defendant excepted to the refusal of the court to give to the jury its third request before argument.

Defendant excepted to the refusal of the court to give to the jury its fourth request before argument.

Defendant excepted to the refusal of the court to give to the jury its "Fourth A" request before argument.

Defendant excepted to the refusal of the court to give to the jury its fifth request before argument.

Defendant excepted to the refusal of the court to give to the jury its sixth request before argument.

Defendant excepted to the refusal of the court to give to the jury its eleventh request before argument.

Charge after Argument.

Whereupon the court charged the jury after argument upon the law and issues joined herein as follows, to-wit:

141 GENTLEMEN OF THE JURY:

I recognize some of your number as having sat with me in the trial of negligence cases before which were tried under widely different rules in some respects from those that are in existence now as applicable to this case and any preconceived ideas in the nature of conclusions that you may have retained as to any direction that may have been given you in cases preceding this with reference particularly to the question of contributory negligence you must disregard for the reason that while in all cases and in each case the jury are expected to take only the instructions in that case, I know that sometimes they are naturally influenced by what may have been instructed them before. The legislature, undoubtedly very wisely, seeing some flaws in the situation as to dangers to servants in the employ of corporations using extensive numbers of men and extensive machinery, have changed some of the common law rules applicable to the relation between master and servant and some of those rules will be directed to you in this case as created by this changed situation.

The original question to be determined by you here is the ordinary common law question whether the defendant railway company in this particular incident was negligent. That is the primary question to be determined because if determined adversely to the plaintiff the

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situation will then not require of you any further consideration. If determined in his favor it will require of you a further consideration of what may be a somewhat complicated question of fact, or rather mixed fact and law. The complaint made in this case has been simply stated to you by counsel on both sides and it is set out
142 in simple enough words in the petition wherein the plaintiff alleges that the defendant company was negligent toward him in that it failed to exercise the proper amount of care in furnishing him a safe place to work in the respect that they had failed to properly safeguard certain wires which caused him to be tripped and injured. This is denied by the defendant's answer and without any evidence, as I directed you before argument, it would be presumed to have been a mere accident; so it comes to a question of fact for your determination whether or not in the situation the defendant company had negligently omitted its duty. Upon this question the burden by law is thrown upon the plaintiff that before you find that issue of fact in his favor you find it as a probability of the truth in the nature of a conclusion from the situation, determining that probability from what you say is a preponderance of the weight of the evidence bearing upon the question. You will understand that in cases of this kind you are not at all required to be certain that you are correct, nor is it expected that those facts at issue shall be shown to you beyond a reasonable doubt. They must be shown, if found affirmatively in favor of the plaintiff, by a preponderance of the weight of the evidence but there need only be a naked preponderance and the determination need be no more nor greater than what the jury believe to be probably the truth.

This accident occurred in defendant company's yard where they receive and distribute trains of cars, evidently quite a large yard in which a large amount of business was done, many operations made during the night and during the day, and many men employed and employed at a work as each of you know required of the men
143 to be more or less constantly alongside of the tracks, on the tracks, and crossing over them. The nature of their work was such that it was a dangerous work; they knew it and the company knew it; and in that situation with reference to the men in their employ the defendant company owed the duty of exercising every such reasonable precaution for their protection as men or corporations of ordinary prudence ordinarily do exercise or would exercise in the same or in similar situations. The court cannot say to you as a matter of law or as a matter of fact that the duty of the company as to these wires in question was or was not one thing or the other. That must be determined by the jury as a question of fact, bearing in mind that in their consideration of it they are to use this rule of law given them as to the exercise of such reasonable precaution as men of ordinary prudence ordinarily do exercise in the same or in similar situations. The place where this accident is claimed to have occurred is what is,—what might be called,—named in the statute a "way." That is a place where the men work and in that situation as I have explained to you, knowing that the men were to work there it was devolved upon the company to exercise the

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proper amount of care. I say to you that the trial judge can afford you no assistance upon the question of fact because that must be determined by you. If you find that the defendant company in that situation had negligently omitted its duty in failing to properly safeguard these wires, the next question for your determination is whether that was the cause of the accident to the plaintiff. That is, was it, as claimed by him, because of his being tripped, thrown down,
144 and either into or under the engine, which caused his injury.

Upon that question a like burden is cast upon plaintiff that before you find it affirmatively in his favor you find it by what you say is a preponderance of the weight of the evidence and as a probability of the truth of the situation involved. At common law this plaintiff would have assumed the risk of working in this yard with these wires in that situation if he had known it. I do not know what you may find and conclude as a matter of fact as to whether he did know it or not but he seems to have worked there a great many years in and about this place but under this statute the fact that he knew the wires were there would not relieve the defendant company of its liability to him so far as the question of its negligence is concerned, for the reason that the statute expressly provides now that if the defendant company be negligent in respect to its ways where its men operated, the men are not held as a matter of law to have assumed the risk of the situation as they would be at common law. Neither is he held to have been guilty of contributory negligence in working about this place merely because he knew the wires were there, because this statute expressly provides that he shall not be held guilty of contributory negligence by reason of his continuing in the service knowing of the defective situation or defective machinery, whichever it may be in the situation. Whether or not, however, he was guilty of contributory negligence in respect to the exact incident occurring at the time of his injury is a question further on to be considered in the case.

In this situation the presumption, without evidence, is that
145 he was not negligent contributing to his own injury, therefore the law says, it being alleged by the defendant as an affirmative defense, that before you find that question affirmatively in favor of the defendant you find it as a probability of the truth of the situation from what you say, fairly considered, is a preponderance of the weight of the evidence bearing upon that particular question, except in the event that if the evidence adduced here by Mr. Welsh, on his own behalf, shall have raised in your minds some presumption or inference that he was negligent contributing directly to his own injury, then in this last event the burden is thrown upon Mr. Welsh to remove that presumption or inference of negligence.

This question of contributory negligence as applied to a case now under the statute is a somewhat complicated one. At common law if Mr. Welsh in this incident had been guilty of even the slightest negligence contributing directly to his injury he could not recover no matter how slight his negligence may have been, no matter how great that of the defendant company may have been he could not recover. This statute, however, has made a change in that respect

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which I will later give you in direction when I have defined to you Mr. Welsh's duty in the situation for his own care. It is a rule of law that in practically every situation in life, wherever a man may be, whatever he may be doing, he, in that situation, for his own protection always owes the duty of exercising ordinary care himself for his own protection, that is, that he is bound, taking into consideration his situation and surroundings and the dangers that are known to him or ought to be known to him, to use every such reasonable
146 precaution for his own protection as a man of ordinary prudence ordinarily would use in the same or a similar situation. It is exactly the same rule of law as to care devolved upon him as the law makes it its rule as to the care devolved upon the defendant company toward him and he is just as much bound to respect and conform to his own duty for his own protection as the defendant company is bound to exercise care for his protection. So that it is material to be considered in this case whether in this situation, getting off from this engine at the time he did and under the circumstances he did, which you may find from the evidence, and at the place he got off,—whether in that situation he was exercising for his own protection that kind and amount of care that an ordinarily prudent man ordinarily would exercise in that or in similar situations. You will bear in mind in considering this question that which I told you about the defendant company's knowledge. Mr. Welsh knew that this yard was a very dangerous place to work, even at its best. We sometimes think too many accidents occur and that they occur without anybody being at fault. Perhaps it is unavoidable but they are dangerous places and, as I said of the company, he also knew it was a dangerous place and he was bound to exercise this care having that in mind. I do not mean that he knew that it was a dangerous place exactly at the point he got off but I mean the yard in general, so you are to say in this situation as the evidence shows you, whether in that situation he failed to exercise the proper amount of care devolved upon him. If he did not so fail and you have found the defendant company negligent in the situation causing his injury then he would be entitled to recover what would be to
147 him full compensation for the injuries suffered. That is an amount of compensation measured up by you without being diminished at all by reason of any contributory negligence on his part. If, however, you find and determine from the evidence that he himself was negligent contributing directly to cause his own injury and shall have found that the defendant company also was negligent, you come then to the consideration of the question which has been adverted to in the instructions before argument and has been argued to you by the counsel for the defendant, and that is this: if both were negligent directly combining to cause this injury then if Mr. Welsh's negligence was equal to or greater than that of the defendant company he can recover nothing. If, however, his was less than theirs or as expressed in the statute his was slight and theirs was gross, or in another statute, his was slight and theirs was greater, then he would be entitled to recover full compensation diminished or lessened in amount by that proportion which you find

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his negligence operated in the situation to contribute to cause the injury. In other words it is a species of the doctrine of comparative negligence. If both were negligent the one who was the most negligent must suffer. If it were the railroad company they must pay something; if it was Mr. Welsh he must go empty handed from the court. That is the peculiar question in the case and has been faily stated to you by counsel and is stated by me here to you as clearly as I find words to use them.

If you get into the question of comparative negligence,—that is, find that both were negligent, your proper way, necessarily is first to find what would otherwise have been full compensation and
148 then to diminish it, providing you so find him entitled to recover, by just such proportion of what you have said is full compensation as you would say was proper in comparison by reason of his own negligence.

Full compensation in a case of this kind would require of you a consideration of the pain and suffering endured by him in the past as a result of it, that which is reasonably certain to come to him in the future as a result of it; it would require of you a consideration of the disability inflicted upon him so far as the past is concerned in the sense of affecting his ability to labor and earn money for himself as well as that same disability in the future which you find is reasonably certain to exist or accrue to him by reason of that injury so received. It would also require of you consideration of the effect of the disability as affecting his ability about his own person in taking care of himself and caring for himself. There is no mathematical way in which these questions can be arrived at and you will understand that the judgment of twelve careful minds on the question is the only proper way to get at it. It should be fairly considered, if you come to the question of damages, and in that situation should be that amount, either full compensation or less than full compensation, as you shall determine the question of contributory negligence.

If you do not find him entitled to recover for either or any of the reasons directed to you by the court, your verdict will be simply for the defendant.

If you do find him entitled to recover it will then be that amount in dollars and cents as you shall find and conclude as the proper amount, under the facts, governing and determining your
149 conclusions in the nature of questions of fact by these rules which have been given you in instruction.

You will appoint one of your number foreman who will sign the verdict you agree upon.

You will now retire.

Plaintiff excepts generally to the charge of the court.

Defendant excepts generally to the charge of the court.

The above and foregoing comprises all the testimony introduced and proceedings had in the trial of the case given in the order as herein appears, as shown by the stenographic notes taken on the trial, of which the foregoing is a true and correct transcript.

CHAS. E. PETERSON,
Ass't Official Stenographer.

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The above stenographer's report contains all the evidence offered by either party in the trial of the case, the requests to charge before argument, the charges of the court both before and after argument, and the exceptions thereto, together with all the objections and exceptions to the introduction or exclusion of evidence taken during the trial, which were made during the trial, and at the time the evidence was being introduced as shown by said report, and in the order therein given, and the jury having found in favor of the plaintiff, the defendant within three days made and filed its motion for a new trial, but the court overruled said motion for a new trial and rendered judgment upon the verdict, and said defendant excepted to said ruling of said court in overruling the said motion for a new trial and rendering judgment on the verdict (as re-
150 duced to writing by the court, as shown by the journal entry in said case) and also to the ruling of the court upon objections to the evidence which were made during the trial as shown by the above report of the evidence, and excepts to the charge of the court, as stated, before and after argument, and prays that this, its bill of exceptions, in that behalf, might be allowed.

And forty days from the overruling of said motion for a new trial having been given the defendant in which to prepare, have allowed, signed and sealed this bill of exceptions and have the same entered upon the journal of said court.

Now, within forty days from the overruling of said motion for a new trial, to-wit: on the 13th day of Jan., A. D., 1912, the above bill of exceptions is placed in the hands of the clerk.

And now, within fifteen days after said forty days, to-wit: on the 25th day of Jan., 1912, the clerk of courts transmitted said bill of exceptions, together with all the amendments and objections thereto to the trial judge.

Whereupon, the above bill of exceptions is allowed by the court, signed and sealed, and upon motion of the defendant ordered to be made a part of the record in this case, but not to be spread upon the journal.

This 25th day of January, 1912.

GEO. F. ROBINSON,
Trial Judge.

(Duly certified.)

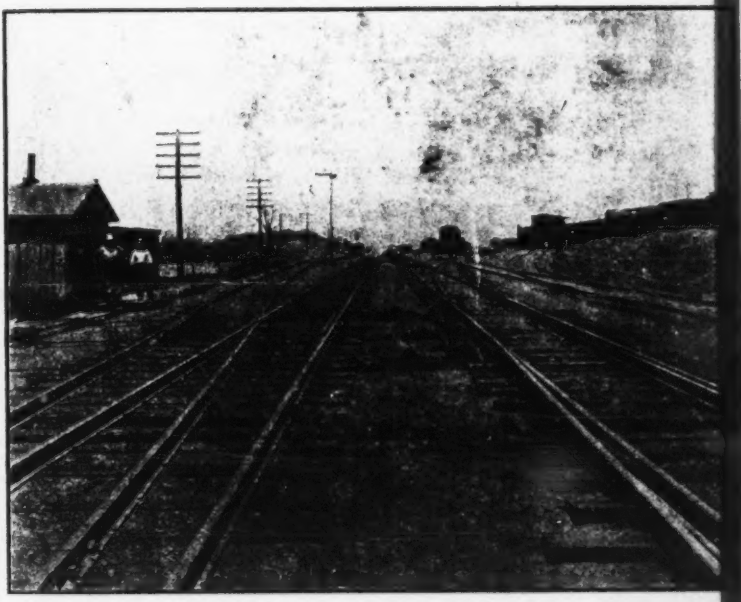
151 DEFENDANT'S EXHIBIT No. 1.

Erie Railroad Company.

T. J. Welsh being duly sworn says: I reside at 531 W. Rayen Ave., Youngstown, O., am 35 years of age, and am a conductor by occupation. I recall the occasion of the accident to myself at East end of Brier Hill, O., on March 7th, 1911, which was witnessed by the following named persons:

Name —, Address —.

On above date about 11.05 P. M. I was conductor of yard crew at above place. We had just taken one car and caboose to F D yard



PLAINTIFF'S EXHIBIT A.



PLAINTIFF'S EXHIBIT B.

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and were returning to Brier Hill. I got on the front footboard of the engine on left hand side at Holmes st. and rode in this position until we got to east end of Brier Hill. The engine was headed west and we were on westbound track and as we approached the cross-over switch which leads into the yard and front end of engine was about on the switch points and about directly in front of the yard office, I stepped down off footboard to go into the yard office. I stepped down with one of my feet and took one or two steps toward the yard office when I stepped onto the interlocking pulley and my foot slipped and I fell backwards and partly turned around. As I turned around toward the left I caught one of my feet on the interlocking wire and I fell back toward the engine. I reached out my left hand to save myself and first finger of left hand was run over by one of the tank wheels. As I fell down I was rolled over by the air chest and threw out my left arm and either one of the
152 front wheels of tank or one of the rear wheels, I do not know which ran over my left elbow. My arm was doubled up and wheel ran over the forearm and upper arm near the elbow. There was about two or three inches of snow on the ground and snow covered the wire and pulley. When I got off the footboard to go into the yard office I didn't think about these interlocking wires. I have been working for the Erie about 14 or 15 years, and have worked at east end of Brier Hill six or seven years in all, both nights and days, but mostly nights. It had been snowing and blowing just previous to the accident but I do not know whether it was snowing at the time of the accident or not. I am married and have three children. We were moving about two or three miles an hour when I got off the footboard. There was nothing wrong with the engine or footboard and none of the men were at fault. The only injury I received was to my left arm.

The above statement was read to by me in the presence of the parties who have signed their names as witnesses hereto, and it is a full, true and correct statement of the facts.

T. J. WELSH.

Signed in the presence of

R. C. WHEELER.

This 9th day of March, 1911.

(Here follow photos marked pages 153 and 154.)

155 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, in the City of Columbus, Ohio, this 29th day of June, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

156 In the Supreme Court of the State of Ohio.

No. 13986.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Petition for Writ of Error.

To the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of the State of Ohio:

The petition of Erie Railroad Company, plaintiff in Error above named, respectfully shows that heretofore, to-wit: on the 11th day of November, A. D., 1913, in the above entitled cause, final judgment was rendered against your petitioner by the Supreme Court of the State of Ohio, the same being the highest court of law and equity in said state of Ohio, wherein it was adjudged that the said Defendant in Error recover from your petitioner the sum of Five Thousand Dollars ($5000.00), with interest from the first day of the September term of Court, A. D. 1911, of the Common Pleas Court of Mahoning County, Ohio, to-wit: the — day of September, A. D., 1911, and costs, and that said Supreme Court of the State of Ohio did thereby affirm the judgment of said Court of
157 Common Pleas of Mahoning County, Ohio, rendered in said action on the 5th day of December, 1911, the judgment of the Circuit Court of said Mahoning County, Ohio, entered on the 24th day of October, 1912.

The petition of said James T. Welsh in said case was for the recovery of damages from your petitioner, by reason of injures to his left arm, and in said petition the plaintiff, said James T. Welsh, complains of your petitioner, that it was unlawfully careless and negligent in failing to properly guard or cover certain wires and a pulley wheel which were used by your petitioner as a part of an interlocking system on its line of railroad in the City of Youngstown, Ohio, and in a certain one of its railroad yards therein located,

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and in failing to provide safe walks and ways about which said plaintiff could discharge his duties, and in failing to provide a signal light about said exposed wires and pulley wheel, and in the maintenance of the walks and ways of said tracks in said yard of your petitioner, and that your petitioner failed to keep them safe and free from the dangers which caused plaintiff's injury as aforesaid.

Upon the trial of said case in said Court of Common Pleas of said Mahoning County, Ohio, and upon the hearing of the same in said Circuit Court in said County and State, and in said Supreme Court of said State, your petitioner claimed a right, privilege and immunity from liability on the ground and for the reason that a certain Federal Statute, namely: that Act commonly known as the Employers' Liability Act of Congress, of April 22nd, 1908, applies to the situation of the parties to the exclusion of any and all
158 legislation of the State of Ohio, and that under the provisions of said Act, the said James T. Welsh assumed the risks incident to the situation whereof he complained, providing he knew, or ought to have known of the same; that said claim of said Plaintiff in Error was denied by said courts and each of them, and that the judgment of said Supreme Court of the State of Ohio, as well as of said Circuit Court and said Court of Common Pleas of Mahoning County, Ohio, is against the right, privilege and immunity especially set up and claimed by your petitioner as aforesaid.

Your petitioner says that it was denied in each and all of said courts the protection of the laws of the United States and said decision is against its rights claimed thereunder. Your petitioner further says that at the trial and hearing of said case in each and all of said courts, it objected to the denial of said right, privilege and immunity so especially set up and claimed by it.

Your petitioner further says that it is a corporation of the State of New York, engaged in the operation of an inter-state line of railway, extending into and through the State of Ohio and other states, and that the transaction involved, and that the matters and things complained of by said James T. Welsh, in the petition in said action, relate to and are a part of the handling and moving of inter-state commerce on said line of railroad.

Your petitioner further says that in the final order, judgment and proceedings prior thereto in this case in said Supreme Court of the State of Ohio, as well as in each and all of said other courts, certain errors were committed to the prejudice of your petitioner, as above indicated, all of which will more in detail appear from the assignment of errors which is filed with this petition.

159 Wherefore, Erie Railroad Company, Plaintiff in Error above named, petitions and prays that a writ of error from the Supreme Court of the United States may issue in its behalf to the Supreme Court of the State of Ohio, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the Supreme Court of the United States.

ERIE RAILROAD COMPANY,
By HINE, KENNEDY & MANCHESTER,
Its Attorneys.

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160 A writ of error as prayed for in the foregoing petition is hereby allowed this 11th day of June, 1914, the writ of error to operate as supersedeas, and the bond for that purpose is fixed at the sum of $12,000.00.

Dated at Columbus, Ohio, this 11th day of June, A. D., 1914.

HUGH L. NICHOLS,

Chief Justice of the Supreme Court of the State of Ohio.

161 [Endorsed:] Case No. 13986. In the Supreme Court of the State of Ohio. Erie Railroad Company, Plaintiff in Error, vs. James T. Welsh, Defendant in Error. Petition for Writ of Error. Filed Jun- 11, 1914. Supreme Court of Ohio, Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

162 In the Supreme Court of the State of Ohio.

No. 13986.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Assignment of Errors.

Now comes Erie Railroad Company, Plaintiff in Error above named, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio, in the above entitled matter, there is manifest error in this, to-wit:—

First. The court erred in refusing to apply the laws of the United States to the situation of the parties in this, to-wit: the Plaintiff in Error claimed a right, privilege and immunity from liability, upon the ground and for the reason that a certain Federal Statute namely: that Act commonly known as the Employers' Liability Act of Congress, of April 22nd, 1908, applies to the situation of the parties to the exclusion of any and all legislation of the State of Ohio upon the same subject, and that under the provisions of said Act Defendant in Error, the said James T. Welsh, assumed the risks incident to the situation whereof he complained, providing he
163 knew or ought to have known of the same; that said claim of said Plaintiff in Error was denied by said court and the decision is against the right, privilege and immunity so especially set up and claimed by Plaintiff in Error, as aforesaid.

Second. That Plaintiff in Error was denied the protection of the laws of the United States and said decision is against its rights claimed thereunder.

Third. The court erred in refusing to sustain and in over-ruling the motion of plaintiff in error made at the close of plaintiff's evidence, in the trial of said case in the Court of Common Pleas of Mahoning County, Ohio, to instruct the jury to return a verdict for

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the defendant, on the ground and for the reason that the evidence discloses that the plaintiff assumed the risk of the conditions complained of, and that he was likewise guilty of negligence producing, or contributing to produce his injury, and on the further ground that the Plaintiff in Error claims a privilege and immunity from liability under the provisions of an act of Congress, commonly known as "Employers' Liability Act" of Congress of April 22, 1908.

Fourth. Said Court erred in refusing to sustain and in over-ruling the motion of this Plaintiff in Error made at the conclusion of all the evidence in the trial of said case in said Court of Common Pleas renewing its motion to arrest its testimony from the jury and direct a verdict in favor of the defendant upon the grounds as then stated, and upon the further grounds, as follows, to-wit:

(1) That plaintiff has failed to show a cause of action against the defendant under the law and the evidence.

(2) That plaintiff has not proven that defendant was guilty of any negligence.

(3) That the evidence shows that the accident was the
164 result of plaintiff's own negligence.

(4) That the evidence shows that plaintiff was guilty of negligence which directly contributed to bring about his injuries.

(5) That under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, defendant claims a privilege and immunity from liability herein.

(6) That under the evidence plaintiff assumed the risk under the provisions of the Employers' Liability Act of Congress of April 22, 1908.

(7) And upon all other proper and legal grounds.

Fifth. That the court erred in refusing to give, and not holding it error to refuse to give defendant's first request to charge as follows, to-wit:

"First. At the conclusion of all the evidence in the above entitled action, the defendant asks the court to arrest the testimony from the jury, and to direct the jury to return a verdict in favor of the defendant."

Sixth. That the court erred in refusing to give, and not holding it error to refuse giving defendant's second request to charge, as follows, to-wit:

"Second. The court says, as a matter of law, that at the time plaintiff sustained the injuries complained of in this case, the defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce; that by reason thereof, the rights and liabilities of both of said parties are, and were at the time, fixed and determined by an act of the Senate and House of Representatives of the United States of America in Congress Assembled, approved April 22nd, 1908, entitled 'An act relating to the liability of common carriers by railroads to their employes in certain cases,' and commonly known as 'The Employers' Liability Act of Congress of April 22nd, 1908'; that under said Act, plaintiff being familiar with and fully understanding the nature and method and manner of construction of the appliances with which, and the places in which he

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was employed, and the dangers and hazards incident thereto, assumed the risks thereof, and cannot recover in this case."

165 Seventh. That the Court erred in refusing to give, and not holding it error to refuse giving defendant's third request to charge, as follows, to-wit:

"Third. If you find that plaintiff was injured while defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, your verdict must be for the defendant for the reason that the Employers' Liability Act of Congress of April 22nd, 1908, applies, and is exclusive of all legislation by the State of Ohio, and the rights of the parties in this action are determined by said Act of Congress, and under the provisions thereof, plaintiff assumed the risks incident to the situation of his employment and injuries, and cannot recover."

Eighth. That the Court erred in refusing to give, and not holding it error to refuse giving defendant's fourth request to charge, as follows, to-wit:

"Fourth. If you find that at the time of plaintiff's injuries, the defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, and if you further find that while so engaged, and prior to and at the time of receiving his said injuries, the plaintiff had knowledge of the character of the interlocking device, and the rails, tracks, place of work, and appliances generally connected with his said accident, and knew and understood the method and manner of construction thereof, and knew and appreciated the dangers and hazards incident thereto, and incident to his said employment, in such situation, he cannot recover in this case, and your verdict must be for the defendant for the reason that, under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, he, in such situation, assumed the risks, and your verdict must then be for the defendant."

Ninth. That the Court erred in refusing to give, and not holding it error to refuse giving defendant's fourth A request to charge, as follows, to-wit:

"If you find that at the time of plaintiff's injuries, the defendant was engaged in interstate commerce, and if you further find that while so engaged, and prior to and at the time of receiving the said injuries, the plaintiff had knowledge of the character of the interlocking device and the rails, tracks and place of work, and appliances generally connected with his said accident, and knew and understood the method and manner and construction thereof, or

166 in the exercise of due care, might have known thereof, and knew and appreciated the dangers and hazards incident thereto, and incident to his said employment in such situation, or in the exercise of due care might have known thereof, he cannot recover in this case, and your verdict must be for the defendant for the reason that under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, he, in such situation, assumes the risk."

Tenth. That the court erred in refusing to give, and not

POOR

holding it error to refuse giving defendant's Fifth request to charge, as follows, to-wit:

"Fifth. The court says to you, as a matter of law, that if you find that plaintiff was injured while defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, then the rights and liabilities of both of said parties are governed and determined by the act commonly known as 'The Employers' Liability Act of Congress of April 22nd, 1908'; and that said act is exclusive of any and all legislation by the State of Ohio, on the same subject, and your verdict, so far as the law of this case is concerned, must be governed by said Federal Statute, as interpreted and explained to you by the Court."

Eleventh. That the Court erred in refusing to give, and not holding it error to refuse giving defendant's Sixth request to charge, as follows, to-wit:

"Sixth. The Court says to you that the defendant in this action claims a privilege and immunity from liability herein for the reason that an Act of Congress commonly known as 'The Employers' Liability Act of Congress of April 22nd, 1908,' applies to the exclusion of any and all legislation of the State of Ohio on the same subject matter, and that such Federal Statute alone determines the rights and liabilities of the parties hereto, and the court therefore instructs you, as a matter of law, that if you find that the plaintiff in this action was injured while employed by defendant in interstate commerce, and while defendant was engaged in interstate commerce in the situation, and if you further find that plaintiff knew and understood the risks and hazards incident to his employment, and which resulted in his injuries, that he assumed the risks and cannot recover in this action."

Twelfth. That the Court erred in refusing to give, and not holding it error to refuse to give defendant's Eleventh request to
167 charge, as follows:—

"Eleventh. The court says to you, as a matter of law, that plaintiff was himself guilty of negligence in his method of alighting from the moving engine, and attempting to cross the tracks, and interlocking appliances in question, and in the event you should find the defendant was negligent, the damages shall be diminished by you in proportion to such amount of negligence as you may attribute to plaintiff."

Thirteenth. The court erred in charging the jury, as follows:

"I recognize some of your number as having sat with me in the trial of negligence cases before which were tried under widely different rules in some respects from those that are in existence now as applicable to this case and any preconceived ideas in the nature of conclusions that you may have retained as to any direction that may have been given you in cases preceding this with reference particularly to the question of contributory negligence you must disregard for the reason that while in all cases and in each case the jury are expected to take only the instructions in that case, I know that sometimes they are naturally influenced by what may have been instructed them before. The legislature, undoubtedly very wisely,

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seeing some flaws in the situation as to dangers to servants in the employ of corporations using extensive numbers of men and extensive machinery, have changed some of the common law rules applicable to the relation between master and servant and some of those rules will be directed to you in this case as created by this changed situation."

Fourteenth. The court erred in charging the jury as follows:

"The place where this accident is claimed to have occurred is what is—what might be called,—named in the statute a 'way'."

Fifteenth. The court erred in charging the jury as follows:

"At common law this plaintiff would have assumed the risk of working in this yard with these wires in that situation if he had known it. I do not know what you may find and conclude
168 as a matter of fact as to whether he did know it or not but he seems to have worked there a great many years in and about this place but under this statute the fact that he knew the wires were there would not relieve the defendant company of its liability to him so far as the question of its negligence is concerned, for the reason that the statute expressly provides now that if the defendant company be negligent in respect to its ways where its men operated, the men are not held as a matter of law to have assumed the risk of the situation as they would be at common law."

Sixteenth. The court erred in charging the jury as follows:

"Neither is he held to have been guilty of contributory negligence in working about this place merely because he knew the wires were there, because this statute expressly provides that he shall not be held guilty of contributory negligence by reason of his continuing in the Service knowing of the defective situation of defective machinery, whichever it may be in the situation."

Seventeenth. The court erred in charging the jury as follows:

"If he did not so fail and you have found the defendant company negligent in the situation causing his injury then he would be entitled to recover what would be to him full compensation for the injuries suffered. That is an entire amount of compensation measured up by you without being diminished at all by reason of any contributory negligence on his part. If, however, you find and determine from the evidence that he himself was negligent contributing directly to cause his own injury and shall have found that the defendant company also was negligent, you come then to the consideration of the question which has been adverted to in the instructions before argument and has been argued to you by the counsel for the defendant, and that is this: if both were negligent directly combining to cause this injury then if Mr. Welsh's negligence was equal to or greater than that of the defendant company he can recover nothing. If, however, his was less than theirs or as expressed in the statute his was slight and theirs was gross, or in another statute, his was slight and theirs was greater, then he would be entitled to recover full compensation diminished or lessened in amount
169 by that proportion which you find his negligence operated in the situation to contribute to cause the injury. In other words it is a species of the doctrine of comparative negligence. If

POOR

both were negligent the one who was the most negligent must suffer. If it were the railroad company they must pay something; if it was Mr. Welsh he must go empty handed from the court. That is the peculiar question in the case and has been fairly stated to you by counsel and is stated by me here to you as clearly as I find words to use them.

If you get into the question of comparative negligence,—that is, find that both were negligent, your proper way, necessarily is first to find what would otherwise have been full compensation and then diminish it, providing you so find him entitled to recover, by just such proportion of what you have said is full compensation as you would say was proper in comparison by reason of his own negligence.

Eighteenth. The court erred in holding,

"In the courts of this state the presumption obtains that the law of the forum controls the rights of the parties to the litigation.

Nineteenth. The court erred in holding,

"Where it is claimed by either party that the law of another state or of the United States applies to the exclusion of the law of the forum, the facts upon which such claim is based must be pleaded."

Twentieth. The court erred in holding,

"Our state courts will take judicial notice of all federal laws. Therefore, it is not necessary that these laws should be pleaded, but only the facts that bring the case within their operation. If it be claimed that the law of another state controls, then the law of that state must be pleaded."

Twenty-first. The court erred in holding,

"The determination of the existence of such facts when denied by answer or reply is a question for the jury, and when no such issue is joined in the pleadings evidence will not be received either to prove or disprove the same, but the presumption will obtain that the law of the forum applies."

Twenty-second. The court erred in holding,

"Where in a suit by an employe of a railroad Company to
170 recover damages for injury sustain- while in the service of such company it is averred and admitted or proven that the servant was engaged in intestate commerce at the time he received the injury complained of, the provisions of the federal employers' liability act of 1908 fixes, limits and controls the rights and liabilities of the parties, to the exclusion of the statute of his state."

Twenty-third. The court erred in holding,

"Where it is claimed by either party to a suit that the laws of another state or the laws of the United States apply to the exclusion of the law of the forum, the facts upon which such claim is based must be pleaded, and when denied by answer or reply it becomes an issue of fact for the determination of the jury."

Twenty-fourth. The court erred in holding,

"It follows, therefore, that if the plaintiff in error desired to avail itself of the benefit of the federal act, it should plead such facts as would bring the transaction within the operation of that act."

Twenty-fifth. The court erred in holding,

"The important inquiry is as to what he was doing at the time the

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accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior orders of the master, and was at the time of the injury proceeding to the master's office for further orders and direction as to his service, so that he was not then and there employed in moving or handling cars engaged in inter-state commerce. That service had been fully completed and ended, and he had not re-engaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would be required would be of interstate character, cannot and does not establish the fact that at the time of the injury he was so engaged."

Twenty-sixth. The court erred in holding,

"The facts in this case having wholly failed to show that plaintiff was engaged in interstate commerce at the time of the
171 accident and injury, the law of the forum applies, and the trial court properly gave in charge to the jury the law of this state."

Wherefore, said Erie Railroad Company prays that the judgment and decision aforesaid may be reversed and altogether held for naught, and that it may be restored to all things which it has lost thereby.

ERIE RAILROAD COMPANY,
By HINE, KENNEDY & MANCHESTER,
Its Attorneys.

172 [Endorsed:] Case No. 13986. In the Supreme Court of the State of Ohio. Erie Railroad Company, Plaintiff in Error, vs. James T. Welsh, Defendant in Error. Assignment of Errors. Filed Jun- 11, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

173 In the Supreme Court of the State of Ohio.

No. 13986.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error,

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States, the question presented in said matter;

It is ordered:

That a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

HUGH L. NICHOLS,
Chief Justice.

Journal 26—Page 500.

174 [Endorsed:] Case No. 13986. In the Supreme Court of the State of Ohio. Erie Railroad Company, Plaintiff in Error, vs. James T. Welsh, Defendant in Error. Order allowing writ of error. Filed Jun- 17, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

175 In the Supreme Court of the State of Ohio.

No. 13986.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Entry of Certification.

On motion of Erie Railroad Company, plaintiff in error, this court orders it to be certified and made a part of the record in this case, and of the judgment and entry of affirmance heretofore rendered and made a part hereof, that in the rendition of said judgment of affirmance, it became and was material to the case to determine whether a certain Federal Statute, namely, that Act commonly known as The Employers' Liability Act of Congress of April 22, 1908, applies to the situation of the parties to the exclusion of any and all legislation of the State of Ohio, upon the same subject; and the court orders it to be further certified that said plaintiff in error especially set up and claimed in brief and argument in this court, but not in the original pleadings filed in common pleas court of Mahoning county, a right, privilege and immunity from liability under the provisions of said Federal Statute, which said claim was by this court denied.

The court further orders it to be certified that this court is the highest court of law and equity in the State of Ohio, in which a decision of this case can be had.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Journal 26—Page 507.

176 [Endorsed:] Case No. 13986. In the Supreme Court of the State of Ohio. Erie Railroad Company, Plaintiff in Error, vs. James T. Welsh, Defendant in Error. Entry of Certification. Filed Jun- 16, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

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177 In the Supreme Court of the State of Ohio.

No. 13986.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the Record and proceedings, as also in the rendition of the judgment, of the plea which is in the said Supreme Court of the State of Ohio, by you or some of you, being the highest court of law or equity of said State in which a decision could be had in a suit between Erie Railroad Company and James T. Welsh, wherein was claimed a right, privilege and immunity from liability on the ground and for the reason that a certain Federal statute and law applied to the situation of the parties which said claim was denied and manifest error hath happened to the great damage of the said Erie Railroad Company, Plaintiff in Error, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid and in their behalf, do command you, if judgment be herein given, that under your seal, distinctly and openly, you sign the record and proceedings aforesaid, of all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City on the 11th day of July, 1914, in the said Supreme Court of the United States, to be then and there held, that, the record
178 and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, which, of *a writ* and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 11 day of June, A. D. 1914.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY,
Clerk of the United States District Court of the Southern District of Ohio, Eastern Division.

Allowed:

By HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

179 [Endorsed:] #13986. In the Supreme Court of the State of Ohio. Erie Railroad Co., P't'f in Error, v. James T. Welsh, Def't in Error. Writ of Error. Filed Jun- 11, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

180 In the Supreme Court of the State of Ohio.

No. 13986.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To James T. Welsh, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington City, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Ohio, wherein Erie Railroad Company is Plaintiff in Error and you are defendant in error, to show cause why, if any there be, *of* the judgment rendered herein against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in *their* behalf.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated 11th day of June, 1914.

Copy of the above citation received this 12th day of June, 1914, at Youngstown, Ohio, and the appearance of the defendant in error is hereby entered.

JAMES T. WELSH,
By W. R. STEWART,
His Attorney.

181 [Endorsed:] 13986. Citation & Entry of Appearance. Filed Jun- 20, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

Mar. 29—Plaintiff's Printed Brief Filed. 4/14/1913—Proof of Service filed.
Apr. 15—Motion by Defendant to Advance, allowed. J. 26—31.
May 29—Defendant's Printed Brief filed. 6/4/1913—Proof of Service filed.
Nov. 11—Judgment Affirmed. J. 26—240.
Nov. 17—Mandate Issued.
" " —Original Papers sent to Clerk.

1914.

Jun- 11—Petition for Writ of Error, Order allowing Writ, Assignment of Errors and Writ of Error, filed.
June 26—Citation and Entry of Appearance of defendant in error filed.
" " —Bond in sum of $12,000 signed by plaintiff in error as principal and National Surety Co. as surety filed.
" " —Copy of Writ of Error and citation lodged in Clerk's office.

Transcript of Journal Entries.

1913.

April 15th—Motion by defendant to advance cause No. 13986, on the General Docket.

"It is ordered by the Court that this motion be, and the same hereby is, allowed."
Journal 26—page 31.

Nov. 11th—This cause came on to be heard upon the transcript of the record of the Circuit Court of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Circuit Court be and the same hereby is, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, *it* is ordered that no penalty be assessed herein. It is ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—. Ordered, that a special mandate be sent to the Court of Common Pleas of Mahoning County, to carry this judgment into execution. It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals of Mahoning County, "for entry."
Journal 26—page 240.

186 Supreme Court of Ohio.

No. 13986.

ERIE RAILROAD COMPANY
vs.
JAMES T. WELSH.

Error to the Circuit Court of Mahoning County.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, entry of certification writ of error, citation and entry of appearance thereon are the original papers filed in this Court in the above entitled case; that the foregoing copy of the bond is a true and correct copy of the original bond filed in said cause, and now lodged in my office; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said cause and used by the Supreme Court of Ohio in the consideration of said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copies from the Records of said Court; that a copy of the writ of error and citation has been lodged in my office; and that no opinion was rendered by the Court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 29th day of June, A. D. 1914.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Endorsed on cover: File No. 24,304. Ohio Supreme Court Term No. 198. Erie Railroad Company, plaintiff in error, vs. James T. Welsh. Filed July 8, 1914. File No. 24,304.

POOR

In the Supreme Court of the United States, October Term, 1915.

No. 198.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES T. WELSH, Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Stipulation.

It is hereby stipulated between the parties that a copy of the opinion of the Supreme Court of Ohio in the above case, as found reported in 89 O. S. page 81, may be printed and added to the record, and to the printed copies of the record.

It is also stipulated that the time for filing the brief of defendant in error be and the same is hereby extended to April 1, 1916.

C. D. HINE &
LEROY A. MANCHESTER,
Attorneys of Record for Plaintiff in Error.
WM. R. STEWART,
Attorney of Record for Defendant in Error.

Dated Jan. 13/16.

Copy of the opinion of the Supreme Court of Ohio is hereto attached.

ERIE RAILROAD CO.
v.
WELSH.

Statement of the Case.

Conflict of laws—Law of forum controls, when—Federal and state laws—Facts to be pleaded, when—Judicial notice of federal laws—State and federal laws to be pleaded, when—Existence of facts question for jury, when—Application of federal employers' liability act of 1908—Personal injury—Master and servant.

1. In the courts of this State the presumption obtains that the law of the forum controls the rights of the parties to the litigation.
2. Where it is claimed by either party that the law of another state or of the United States applies to the exclusion of the law of the forum, the facts upon which such claim is based must be pleaded.
1. Our state courts will take judicial notice of all federal laws. Therefore, it is not necessary that these laws should be

COPY

pleaded, but only the facts that bring the case within their operation. If it be claimed that the law of another state controls, then the law of that state must be pleaded.

4. The determination of the existence of such facts when denied by answer or reply is a question for the jury, and when no such issue is joined in the pleadings evidence will not be received either to prove or disprove the same, but the presumption will obtain that the law of the forum applies.
5. Where in a suit by an employe of a railroad company to recover damages for injury sustained while in the service of such company it is averred and admitted or proven that the servant was engaged in interstate commerce at the time he received the injury complained of, the provisions of the federal employers' liability act of 1908 fixes, limits and controls the rights and liabilities of the parties, to the exclusion of the statute of the state.

(No. 13986. Decided November 11, 1913.)

Error to the Circuit Court of Mahoning County.

The defendant in error, James T. Welsh, recovered a judgment in the common pleas court of Mahoning County for damages on account of personal injuries received by him while working as a yard conductor in the Brier Hill yards at Youngstown, Ohio. This judgment was affirmed by the circuit court, and this proceeding in error is here prosecuted to reverse the judgments of the circuit and common pleas courts.

The petition avers that the Erie Railroad Company maintained switches, operated by means of wires running along through the yards under and about the tracks to a tower, which switches were operated by means of a lever; that said wires and pulley wheels were wholly without protection or covering, and were so placed as to make the place, where the plaintiff was obliged to work, unsafe and dangerous; that the same could not be seen in the darkness; that no signal lights were placed thereon to warn workmen of the danger; and plaintiff avers that the defendant was unlawfully careless and negligent in not properly guarding said wires and pulley wheels in and about said runway, and thus protect its employes from danger of being entrapped in the darkness and thrown under moving cars, and that by reason of such negligence on the part of the defendant, the plaintiff, while in the discharge of his duties and without fault on his part, was injured.

The defendant admits that the plaintiff sustained injuries while in its employ at the place and at the time named in the petition, but denies the nature, character and extent of the injuries, as in the petition described; denies that they were produced by the causes therein set forth, and denies each and every allegation, statement and averment in the petition of plaintiff, except those admitted to be true.

The answer further avers that the plaintiff was guilty of negligence, inattention and lack of care directly contributing to produce

POOR

such injury, in failing to keep a proper lookout, and failing to exercise his senses to look where and how he was going, and where he was stepping, and in carelessly stepping and falling in such place in a manner to cause his injuries.

The plaintiff by reply denied that he was guilty of negligence, inattention and lack of care directly contributing to produce said accident and injuries. The plaintiff in error claims that under the evidence the case was governed by the federal employers' liability act of 1908, under the provisions of which the defendant in error, knowing of the construction of the interlocking system and being perfectly familiar with the yards, assumed the risk. The defendant in error claims that at the time of the injury he was engaged in intrastate commerce, and that the federal employers' liability act relating to persons engaged in interstate commerce does not apply, and the trial court took this view of the case and instructed the jury accordingly.

Messrs. Hine, Kennedy & Manchester, for plaintiff in error.
Mr. William R. Stewart for defendant in error.

DONAHUE, *J.*:

An act of Congress, in so far as it covers any subject-matter upon which Congress has the right to legislate, supersedes the statutes of a state, and, therefore, if the defendant in error was at the time he sustained the injuries described in his petition engaged in interstate commerce, then the federal employers' liability act of 1908 applies to this case, and the provisions of that act entirely supersede the state statutes in relation to the rights and liabilities of the parties to this suit.

The principal question presented by this record is a question of fact rather than law. It is claimed on the part of the plaintiff in error that the record shows that the defendant in error was employed in handling cars engaged in interstate commerce at the time of his injury. This is disputed by the defendant in error, and the determination of that question is a final solution of this case.

This issue of fact was not joined by the pleadings. The trial court refused to give in charge to the jury the provisions of the federal employers' liability act of 1908, but, on the contrary, instructed the jury in accordance with the law of this state.

It appears from the evidence that the plaintiff was in the employ of the defendant as yard conductor working about its Brier Hill yards at Mosier, Ohio, that his duties were confined to that locality and wholly within the state. These facts being undisputed, the presumption arises that the law of the state in which he was employed and in which the accident occurred and in the courts of which state this action is pending, control the rights and liabilities of employer and employe. Where it is claimed by either party to a suit that the laws of another state or the laws of the United States apply to the exclusion of the law of the forum, the facts upon which such claim is based must be pleaded, and when denied by answer or reply, it becomes an issue of fact for the determination of the jury. If the claim is that the law of another state controls, then the law of that

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state must be pleaded. Our state courts, however, take judicial notice of the laws of the United States, and, therefore, it is never necessary to plead such laws. L. & N. Rd. Co. v. Scott, 133 Ky., 724.

In the case of St. L., I. M. & S. Ry. Co. v. Hesterly, 98 Ark., 240, it is held, in the second paragraph of the syllabus of that case, that "While it is not necessary to plead a federal statute, yet allegations constituting a cause of action or defense thereunder must be made in order to have the benefit thereof."

In the case of Brinkmeier v. Mo. Pac. Ry. Co., 81 Kans., 101, at page 104, the court said: "There was nothing in the petition to suggest even remotely that the car the defective equipment of which caused the plaintiff's injury was so used. Therefore, as decided at the former hearing, the petition stated no cause of action under the federal statute. It is urged however, that the court should have allowed an amendment. The statute of limitation had barred an action based upon as act of Congress before leave to amend was asked. It was then too late for such an amendment."

In the case of Allen v. Tuscarora Valley Rd. Co., 229 Pa. St., 97, the same doctrine was announced, and it was there held that an amendment to an original pleading by a plaintiff after the statute of limitations had expired seeking to bring his cause within the operation of the federal statute, introduced a new and different cause of action, subject to the statute of limitations.

In the case of K. C., M. & B. Rd. Co. v. Flippo, 138 Ala., 487, it was held that "it is not necessary for the complainant to set out specially said statute and aver its violation, but it is sufficient if the complaint avers a state of facts which show a failure on the part of the railroad company to comply with the requirements of the statute."

In the case of Chicago & Erie Rd. Co. v. Hamerick, Adm'r, 50 Ind. App., 425, it was held that "where a pleader seeks to state a cause of action under the statute, facts must be averred which bring the case within the provision of the statute."

To the same effect is the holding in the case of C., I. & L. Ry. Co. v. Barnes, 164 Ind., 143.

It follows, therefore, that if the plaintiff in error desired to avail itself of the benefit of the federal act, it should have pleaded such facts as would bring the transaction within the operation of that act. It is, of course, not necessary that it should plead the terms and provisions of the federal act. It is only necessary that it aver the facts that show that the federal act, and not the state law, applies. This tenders an issue of fact, which if denied by the reply must be determined as any other issue of fact in the case. If the defendant below should fail to plead facts that would take the transaction out of the law of the forum and bring it within the operation of federal law, then it could not be permitted over the objection of plaintiff to introduce any evidence in proof of such facts, because no such issue is presented by the pleadings. If, however, the defendant does not plead facts that, if proven, would bring the transaction within the operation of federal law, yet if the evidence introduced by plaintiff

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in support of the allegations of his petition shows that he was engaged in interstate commerce, or if the defendant, without objection on the part of plaintiff, introduced evidence of such facts, then it is the duty of the court to charge the provisions of the federal act instead of the provisions of the state statutes, unless there should be a conflict of evidence, in which event, an amendment should be permitted and the issue of fact submitted to the jury with proper instructions to apply the state or federal law as the jury may determine the fact to be.

In this case however, it does not appear that there is any conflict of evidence, at least no material conflict. If we are correct in the proposition that the presumption obtains that the law of the forum applies to the transaction, then it is necessary in order to overcome this presumption to show that the plaintiff at the time of the injury was actually employed in moving or handling cars engaged in interstate traffic. Notwithstanding his employment may have been entirely local and wholly within the State, yet, if in the course of his service it became his duty to handle or assist in handling cars engaged in interstate commerce, either by taking them out of or putting them into trains, or shifting them about the various parts of the railway yards, he must be held to have been engaged in interstate commerce, while actually so engaged in this service, and the federal laws upon that subject would apply to any transaction occurring while he was actually so employed. There is some evidence in this record that shortly before his injury he was assisting in shifting a car containing interstate traffic en route for Meadville, Pennsylvania, but it also appears that after that service had been performed he had handled a caboose and placed *in it* "Fitch's Pocket" and there is no evidence whatever tending to show that this caboose was engaged in interstate commerce. There is also some evidence tending to show that the next service he would be required to perform would be in relation to cars engaged in interstate commerce, but what he had been doing before the time of the accident or what he might have done shortly thereafter, if the accident had not happened, is not very important in determining this question. The important inquiry is as to what he was doing at the time the accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior orders of the master, and was at the time of the injury proceeding to the master's office for further orders and direction as to his service, so that he was not then and there employed in moving or handling cars engaged in interstate commerce. That service had been fully completed and ended, and he had not reengaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would require would be of interstate character, cannot and does not establish the fact that at the time of the injury he was so engaged. The facts in this case having wholly failed to show that plaintiff was engaged in interstate commerce at the time of the accident and injury, the law of the forum ap-

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plies, and the trial court properly gave in charge to the jury the law of this state.

Judgment affirmed, and cause remanded for execution.

Nichols, C. J., Johnson, Wanamaker and Wilkins, JJ., concur.

[Endorsed:] 198/24,304. Case No. 198. In the Supreme Court of U. S., October Term, ——. Erie R. R. Co., Plaintiff in Error, vs. James T. Welsh, Defendant in Error. Stipulation and Addition to Record. Hine, Kennedy & Manchester.

[Endorsed:] File No. 24,304. Supreme Court U. S., October term, 1915. Term No. 198. Erie Railroad Company, Pl'ff in Error, vs. James T. Welsh. Stipulation and addition to record. Filed January 15, 1916.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 29

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES T. WELSH, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

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INDEX.

	Page
Statement of case	1
Assignment of errors	3
Synopsis of argument	5
Argument	6
First. The Federal statute is exclusive and supersedes all State laws on the same subject	6
Copy of Federal statute	6
Second. The common-law doctrine as to assumption of risk is a defense in this case	7
Third. The defendant seasonably claimed its right to have the Federal statute applied	9
A. It was not necessary to plead the Federal act	9
B. Evidence having been received without objection tending to show interstate commerce, and the Supreme Court of Ohio having passed upon the sufficiency of such evidence, such court was bound to determine the question correctly	11
Fourth. The parties were engaged in interstate commerce when the plaintiff was injured	12
Holding of the Supreme Court of Ohio	12
Facts	13
Authorities	15
Conclusion	42

List of Authorities.

Armbruster *vs.* Chicago, R. I. & P. Ry. Co., 147 N. W., 337 (Iowa)	23
Atlantic C. L. R. Co. *vs.* Jones, 9 Ala. App., 499; 63 So., 693	23
Berlin *vs.* Ore.-Wash. R. & Nav. Co., 142 Pac., 554	39
Baltimore & O. R. Co. *vs.* Whitacre, 92 Atl., 1060 (Md.)	32
Baltimore & O. R. Co. *vs.* Darr, 204 Fed., 751	16
Barker *vs.* Kansas City, M. & O. Ry. Co., 88 Kan., 767; 129 Pac., 1151; 43 L. R. A. (N. S.), 1121	21
Barlow *vs.* Lehigh Valley R. Co., 107 N. E., 814 (N. Y.)	32
Cross *vs.* Chicago, B. & Q. R. Co., 177 S. W., 1127 (Mo.)	16
Clark *vs.* Chicago G. W. R. Co., 152 N. W., 635 (Iowa)	16
Cincinnati, N. O. & T. P. Ry. Co. *vs.* Bonham, 171 S. W., 79 (Tenn.)	22

Page

Cousins *vs.* Illinois C. R. Co., 148 N. W., 58 (Minn.) 23
Crandall *vs.* Chicago G. W. R. Co., 150 N. W., 165 (Minn.) 23
Deal *vs.* Coal & Coke Ry. Co., 215 Fed., 285 15
Erie R. R. Co. *vs.* Welsh, 89 O. S., 81 7
Eng. *vs.* Southern Pacific Co., 210 Fed., 92 18
Fernette *vs.* Pere Marquette R. Co., 144 N. W., 834 (Mch. 1914) 20
Freeman *vs.* Powell, 144 S. W., 1033 34
Gaines *vs.* Detroit, G. H. & M. Ry. Co., 148 N. W., 397 (Mch. 1914) 16
Grow *vs.* Oregon Short Line R. Co., 138 Pac., 398 (Utah 1914). 18
Graber *vs.* Duluth S. S. & Ky. Co., 150 N. W., 489 40
Hardwick *vs.* Wash. R. Co., 168 S. W., 328 (Mo. 1914) 19
Horton *vs.* Oregon-Washington R. & Nav. Co., 72 Wash., 503; 130 Pac., 897 29
Illinois Central R. Co. *vs.* Nelson, 203 Fed., 956 21
Illinois Central R. Co. *vs.* Porter, 207 Fed., 311 21
Illinois Central R. Co. *vs.* Behrens, 223 U. S., 273 26
Jones *vs.* Chesapeake & O. Ry. Co., 149 Ky., 566; 149 S. W., 951. 15
Johnson *vs.* Southern Pac. Co., 196 U. S., 1 27
Knowles *vs.* N. Y., N. H. & H. R. Co., 150 N. Y. S., 99 18
Kamboris *vs.* Oregon-W. R. & N. Co., 146 Pac., 1097 (Ore.) ... 21
Lloyd *vs.* Southern Ry. Co., 81 S E., 1003 (N. C. 1914) 19
Law *vs.* Illinois Central R. Co., 208 Fed., 869 15
Lombardo *vs.* Boston & M. R. Co., 223 Fed., 427 16
Lamphere *vs.* Oregon R. & Nav. Co., 196 Fed., 336 17
Louisville & N. R. Co. *vs.* Walker's Admr., 162 Ky., 209; 172 S. W., 517 18
Mondu *vs.* N. Y., N. H. & H. R. Co., 223 U. S., 1, 55; 32 Sup. Ct. Rep., 169 6
Missouri, K. & T. Ry. Co. *vs.* Denahy, 165 S. W., 529 (Tex. 1914) 15
Missouri, K. & R. Ry. Co. *vs.* Rentz, 162 S. W., 959 (Tex.) 15
Montgomery *vs.* Southern Pac. Co., 64 Ore., 597, 131 Pac., 507. 20
N. Carolina R. Co. *vs.* Zachary, 232 U. S., 248; 34 S. C. R., 305. 6
Northern Pacific Ry. Co. *vs.* Maerkl, 198 Fed., 1 15
Nashville, C. & St. L. R. Co. *vs.* Banks, 156 Ky., 609; 161 S. W., 554 19
N. Y. Central & H. R. R. R. Co. *vs.* Carr, 238 U. S., 260; 35 Sup. Ct. Rep., 780 26
Neil *vs.* Idaho & W. N. R. R., 125 Pac., 331 (Idaho) 36
Oberlin *vs.* Oregon, W. K. & N. Co., 142 Pac., 554 (Ore) 23
Pedersen *vs.* Delaware, L. & W. R. Co., 229 U. S., 146; 33 S. C. R., 648 15

Page

Perry *vs.* Illinois Central R. Co., 143 N. W., 724 (Minn. 1913); 150 N. W., 382 20
Pittsburgh, C., C. & St. L. Ry. Co. *vs.* Glinn, 219 Fed., 148 21
Pittsburgh, C., C. & St. L. Ry. Co. *vs.* Farmers' T. & S. Co., 108 N. E., 108 (Ind.) 22
P., B. & W. *vs.* Tucker, 35 App. D. C., 123; 220 U. S., 608 28
St. L., S. F. & T. R. Co. *vs.* Seale, 229 U. S., 156; 33 S. C. R., 651 6
Seaboard Air Line Ry. Co. *vs.* Horton, 233 U. S., 492; 34 Sup. Ct. Rep., 635 7
Southern Ry. Co. *vs.* Crockett, 234 U. S., 725; 34 Sup. Ct. Rep., 897 7
St. Louis & S. F. Ry. Co. *vs.* Conarty, 103 Ark., 421; 155 Sup. Ct. Rep., 93 16
Saunders *vs.* Southern Ry. Co., 83 S. E., 573 17
San Pedro R. Co. *vs.* Davide, 210 Fed., 870 30
St. Louis S. W. Ry. Co. *vs.* Brothers, 165 S. W., 488 (Tex., 1914) 17
Southern Ry. Co. *vs.* Jacobs, 81 S. E., 99 (Va., 1914) 32
Sanders *vs.* Charleston & W. C. Ry. Co., 81 S. E., 283 (S. C. 1914) 20
Smith *vs.* Industrial A. C. of California, 147 Pac., 600 (Cal.) .. 21
St. Louis S. W. Co. *vs.* Anderson, 173 S. W., 834 (Ark.) 21
Southern Ry. Co. *vs.* Puckett, 85 S. E., 809 (Ga.) 20
Thomson *vs.* Columbia & P. S. R. Co., 205 Fed., 203 15
Truesdale *vs.* Chesapeake & O. Ry. Co., 159 Ky., 718; 169 S. W., 471 15
Thomas *vs.* Boston & M. R. Co., 219 Fed., 180 16
Tralich *vs.* Chicago, M. & St. P. Ry. Co., 217 Fed., 675 16
Texas & P. R. Co. *vs.* White, 177 S. W., 1185 (Tex.) 17
Thompson *vs.* Cincinnati, N. O. & T. P. Ry. Co., 165 Ky., 256; 176 S. W., 1006 19
Thornbro *vs.* Kansas City, M. & O. Ry. Co., 139 Pac., 410 (Kan., 1914); 142 Pac., 250 20
Tonselliot *vs.*. N. Y. C. & H. R. R. Co., 94 Atl., 804 (N. J.) 21
Vandalia R. Co. *vs.* Holland, 108 N. E., 580 (Ind.) 23
Winters *vs.* Minneapolis & St. L. R. Co., 148 N. W., 106 (Minn.) 17
Willever *vs.* Delaware, L. & W. R. Co., 94 Atl., 595 (N. J.) 33
Zikos *vs.* Ore. R. & Nav. Co., 179 Fed., 893 31

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 198.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES T. WELSH, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On March 7, 1911, James T. Welsh was employed by Erie Railroad Company as a yard conductor at Youngstown, Ohio. At about 11 o'clock p. m. of that day, as he attempted to alight from the footboard of a moving locomotive, for the purpose of going to the yard-master's office for orders, he stepped onto a pulley wheel of an interlocking system situated between the tracks, and the turning of the pulley under his weight caused his feet to catch in the interlocking wires, as a result of which he fell with his left elbow under the wheels of the engine. The moving wheels injured his elbow.

He filed his petition in the Common Pleas Court of Mahoning County, Ohio, claiming that the defendant was negligent "in failing to properly guard or cover said wires and pulley wheel" (R., p. 7). The wires and pulleys are shown in the photographs at pages 153, 154 of the record. The answer is a general denial, with a plea of contributory negligence (R., p. 9). The reply denies contributory negligence, and avers that plaintiff's injuries were caused by the negligence of the defendant and the defective condition of its switching appliance, "in that pulley wheel and wires were permitted to be left uncovered" (R., p. 9).

In the plaintiff's evidence certain facts tending to show that the parties were engaged in interstate commerce appeared, and at the conclusion of plaintiff's evidence the defendant asked the court to instruct the jury to return a verdict for the defendant, on the ground, among other things, that the evidence disclosed that plaintiff assumed the risk of the conditions complained of, and that the defendant claimed a privilege and immunity from liability under the provisions of an act of Congress commonly known as the Employers' Liability Act of Congress of April 22, 1908. This motion was overruled and the defendant excepted (R., p. 51). The defendant then, among other things, introduced further evidence tending to show interstate commerce, and at the conclusion of all the evidence renewed its motion to direct a verdict in its favor, upon the ground, among others, that the Federal Employers' Liability Act applied, and that under its provisions the plaintiff assumed the risk and the defendant claimed an immunity from liability herein. This motion was overruled and defendant excepted (R., pp. 81, 82, 87).

The defendant then submitted to the court certain requests to charge, claiming that the Federal Employers' Liability Act applied, to the exclusion of State legislation on the same subject, and that plaintiff assumed the risk under such act, or at least that the jury should pass upon the question of assumption of risk (R., pp. 83, 84). These requests were refused and the defendant excepted (R., p. 87).

In the general charge to the jury the court refused to submit the question of assumed risk to the jury, but expressly directed that there could be no assumption of risk, thereby applying the statute of Ohio commonly known as the Metzger Act (R., p. 89), General Code of Ohio, section 9017.

To the charge of the court the defendant entered an exception, according to the practice in Ohio (R., p. 91).

The jury returned a verdict for the plaintiff in the sum of $5,000, and the defendant's motion for new trial was overruled, and judgment entered on this verdict (R., p. 11).

On error proceedings to the circuit court this judgment was affirmed. It was later affirmed by the Supreme Court of Ohio and is found reported in 89 O. S., 81.

Assignment of Errors.

Since these questions were raised in different ways in the different courts, a number of assignments of error have been made (R., p. 96). To get the question properly before this court, however, it is, we think, only necessary at this stage of the proceedings to call particular attention to the following:

> "Fifth. That the court erred in refusing to give, and not holding it error to refuse to give defendant's first request to charge as follows, to wit:
>
> " 'First. At the conclusion of all the evidence in the above-entitled action, the defendant asks the court to arrest the testimony from the jury, and to direct the jury to return a verdict in favor of the defendant' " (R., p. 97).
>
> "Eighth. That the court erred in refusing to give, and not holding it error to refuse giving defendant's fourth request to charge as follows, to-wit:
>
> " 'Fourth. If you find that at the time of plaintiff's injuries, the defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, and if you further find that while so engaged, and prior to and at the time of receiving his said injuries, the plaintiff had knowledge of the character of the interlocking device, and the rails, tracks,

place of work, and appliances generally connected with his said accident, and knew and understood the method and manner of construction thereof, and knew and appreciated the dangers and hazards incident thereto, and incident to his said employment, in such situation, he cannot recover in this case, and your verdict must be for the defendant for the reason that, under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, he, in such situation, assumed the risks, and your verdict must then be for the defendant' " (R., p. 98).

"Tenth. That the court erred in refusing to give, and not holding it error to refuse giving defendant's fifth request to charge, as follows, to-wit:

" 'Fifth. The court says to you, as a matter of law, that if you find that plaintiff was injured while defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, then the rights and liabilities of both of said parties are governed, and determined by the act commonly known as 'The Employers' Liability Act of Congress of April 22nd, 1908'; and that said act is exclusive of any and all legislation by the State of Ohio, on the same subject, and your verdict, so far as the law of this case is concerned, must be governed by said Federal statute as interpreted and explained to you by the court' " (R., pp. 98, 99).

"Fifteenth. The court erred in charging the jury as follows:

" 'At common law this plaintiff would have assumed the risk of working in this yard with these wires in that situation if he had known it. I do not know what you may find and conclude as a matter of fact as to whether he did know it or not, but he seems to have worked there a great many years in and about this place, but under this statute the fact that he knew the wires were there would not relieve the defendant company of its liability to him so far as the question of its negligence is concerned, for the reason that the statute expressly provides now that if the defendant company be negligent in respect to its ways where its men operated, the men are not held as a matter of law to have assumed the risk of the situa-

tion as they would be at common law'" (R., p. 100).

"Twenty-fourth. The court erred in holding:

" 'It follows, therefore, that if the plaintiff in error desired to avail itself of the benefit of the Federal act, it should plead such facts as would bring the transaction within the operation of that act'" (R., p. 101).

"Twenty-fifth. The court erred in holding:

" 'The important inquiry is as to what he was doing at the time the accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior orders of the master, and was at the time of the injury proceeding to the master's office for further orders and direction as to his service, so that he was not then and there employed in moving or handling cars engaged in interstate commerce. That service had been fully completed and ended, and he had not re-engaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would require would be of interstate character cannot and does not establish the fact that at the time of the injury he was so engaged'" (R., pp. 101, 102).

Synopsis of Argument.

It is our contention that the courts of Ohio erred in refusing to apply the law of the United States to this case, to wit, the Federal Employers' Liability Act of 1908. We claim that this act is exclusive and supersedes the statutes of Ohio on the same subject; that under this statute the defense of assumed risk is open in this case; that the right to have the Federal statute applied was seasonably and properly claimed, and that the record shows that the parties were engaged in interstate commerce when plaintiff was injured.

We make this claim upon the following propositions:

First. The Federal statute is exclusive and supersedes all State laws on the same subject.

Second. The common-law doctrine as to assumption of risk is a defense in this case.

Third. The defendant seasonably claimed its right to have the Federal statute applied.

A. It was not necessary to plead the Federal act.

B. Evidence having been received without objection tending to show interstate commerce, and the Supreme Court of Ohio having passed upon the sufficiency of such evidence, such court was bound to determine the question correctly.

Fourth. The parties were engaged in interstate commerce when the plaintiff was injured.

ARGUMENT.

First. The Federal statute is exclusive and supersedes all State laws on the same subject.

It is now too well settled to admit of argument that where the railroad company is, at the time of an injury to an employee, engaged as a common carrier in interstate commerce, and the employee is employed by such carrier in such commerce, the Federal act governs to the exclusion of the statutes of the State.

Mondu *vs.* N. Y., N. H. & H. R. Co., 223 U. S., 1, 55; 32 Supreme Ct. Rep., 169.

St. L., S. F. & T. R. Co. *vs.* Seale, 229 U. S., 156, 158; 33 Sup. Ct. Rep., 651.

N. Carolina R. Co. *vs.* Zachary, 232 U. S., 248; 34 Sup. Ct. Rep., 305.

Sections 1 and 4 of the Employers' Liability Act of Congress of April 22, 1908, c. 149, 35 Stat., 65, read as follows:

> "*Be it enacted, &c.*, That every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of

Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Second. The common-law doctrine as to assumption of risk is a defense in this case.

It is also now too well settled to admit of argument that the doctrine of assumed risk, as applied in the Federal courts, was not changed by the Federal Employers' Liability Act, except with regard to the violation by the carrier of statutes enacted for the safety of employees.

Seaboard Air Line Ry. Co. *vs.* Horton, 233 U. S., 492; 34 Sup. Ct. Rep., 635.

Southern Ry. Co. *vs.* Crockett, 234 U. S., 725; 34 Sup. Ct. Rep., 897.

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The facts in this case call for the application of the doctrine of assumed risk.

Welsh had worked for the Erie Railroad Company about fourteen years, and for ten or eleven years of that time he had worked as a yard conductor (R., p. 24). He had worked both days and nights. About four months of his service as yard conductor working days was spent in the Brier Hill yards, and about three or four years working nights was spent in the Brier Hill yards. Each night his engine moved up and down the tracks more than one hundred times. He would go to the yard-master's office to get orders—the thing which he was doing when hurt—sometimes four or five times a night. He testified that he had been in the office hundreds and hundreds of times. He had served at this very place as yard-master for about a month and knew all about the tracks and switches (R., pp. 30, 31, 49). He was "perfectly familiar with that yard" (R., p. 32). In his written statement, made shortly after the accident, he says: "When I got off the footboard to go into the yard office, I didn't think about these interlocking wires" (R., p. 93).

He says it was snowing and blowing when he stepped off the engine, although this is denied by other members of the crew. He appreciated the dangers of the situation, for he says: "I knew there was interlocking there, and the reason I got off where I did twenty or thirty yards east of the yard-master's office, I knew there was a big bunch of it in front of the yard-master's office which I wanted to avoid. I got off twenty or thirty yards east of that, and got into a trap" (R., p. 34).

The appliance of which the plaintiff complains consists simply of ordinary wires running on pulleys between the tracks (photographs, R., pp. 153 and 154; R., pp. 71, 72). The appliance was installed in 1905, and at the time of the accident was in the same condition as when constructed (R., pp. 71, 73).

In the charge to the jury the trial court said:

"I do not know what you may find and conclude, as a matter of fact, as to whether he did know it or not, but he seems to have worked there a great many years in and about this place. But under this statute the fact that he knew the wires were there would not relieve the defendant company" * * * (R., p. 89).

From the foregoing it is clear that there was no violation of any statute enacted for the safety of employees, and if the court could not say, as a matter of law, that plaintiff assumed the risk, the question was, at least, one for the jury, and the court erred in refusing defendant's fourth request before argument (R., p. 83, eighth assignment of errors, *supra*).

Third. The defendant seasonably claimed its right to have the Federal statute applied.

A. *It was not necessary to plead the Federal act.*

The Supreme Court of Ohio held:

"In the courts of this State the presumption obtains that the law of the forum controls the rights of the parties to the litigation."

"Where it is claimed by either party that the law of another State or of the United States applies to the exclusion of the law of the forum, the facts upon which such claim is based must be pleaded."

"The determination of the existence of such facts when denied by answer or reply is a question for the jury, and when no such issue is joined in the pleadings evidence will not be received either to prove or disprove the same, but the presumption will obtain that the law of the forum applies."

1, 2, and 4, Syllabi; Erie R. R. Co. *vs.* Welsh, 89 O. S., 81.

We do not understand this to be in harmony with what this court has said upon the same subject. It is our contention that the laws of the United States are just as much a part of the law of the forum in a case tried in the State

courts of Ohio as are the statutes of Ohio themselves. Indeed, the Federal laws are of first importance and supersede the State laws; otherwise, they would not be "the supreme law of the land," as prescribed by the Federal Constitution. If, therefore, the plaintiff pleads facts making a case under the State statute it would seem that the defendant, under a general denial, should be permitted to show any facts going to disprove the case as pleaded, including the fact of interstate commerce. And as soon as that fact appears in the evidence the Federal laws become applicable.

It seems to us that the following applies:

> "When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State courts erred in overruling it."
>
> St. L., S. F. & T. R. Co. *vs.* Seale, 229 U. S., 156; 33 Sup. Ct. Rep., 651.

The same rule was applied by this court in the case of Toledo, St. L. & Western R. R. Co. *vs.* Otto E. Slavin, 236 U. S., 454; 35 Sup. Ct. Rep., 306, reversing the Supreme Court of Ohio in the same case reported in 88 O. S., 536; 106 N. E., 1077. In this case neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act, and evidence of interstate commerce was admitted over the plaintiff's objection. The Supreme Court of Ohio held that the case was governed by the Ohio statute (General Code of Ohio, secs. 9017, 9018). The Supreme Court of Ohio took the same action in the case at bar. In the Slavin case this court says:

> "But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the State statute, the defendant was entitled to disprove liability under the Ohio act, by showing that the in-

> jury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law."

B. *Evidence having been received without objection tending to show interstate commerce, and the Supreme Court of Ohio having passed upon the sufficiency of such evidence, such court was bound to determine the question correctly.*

If, however, the court should be disposed to hold that the fact of interstate commerce must be pleaded in order that evidence thereof may be competent, nevertheless, in this case, the question is properly made and saved because the Supreme Court of Ohio examined the evidence and determined the question. In the opinion we find the following:

> "If, however, the defendant does not plead facts that, if proven, would bring the transaction within the operation of Federal law, yet if the evidence introduced by plaintiff in support of the allegations of his petition shows that he was engaged in interstate commerce, or if the defendant, without objection on the part of plaintiff, introduced evidence of such facts, then it is the duty of the court to charge the provisions of the Federal act instead of the provisions of the State statutes, unless there should be a conflict of evidence, in which event an amendment should be permitted and the issue of fact submitted to the jury with proper instructions to apply the State or Federal law as the jury may determine the fact to be."
>
> 89 O. S., 87.

The court then finds that "it does not appear that there was any conflict of evidence; at least no material conflict" (89 O. S., 87). And after discussing the facts further finds: "The facts in this case having wholly failed to show that plaintiff was engaged in interstate commerce at the time of

the accident and injury, the law of the forum applies, and the trial court properly gave in charge to the jury the law of this State" (89 O. S., 89).

On this question this court has said:

> "Since it appears that defendant expressly claimed immunity by reason of the act of Congress and the highest courts of the State either decided or assumed that the record sufficiently presented the question of Federal right, and decided against the party asserting that right, the decisions of this court render it clear that it is our duty to pass upon the merits of the Federal question."
>
> N. Carolina *vs.* Zachary, 232 U. S., 248; 34 Sup. Ct. Rep., 305, 307.

We, therefore, think the question is properly presented.

Fourth. The parties were engaged in interstate commerce when the plaintiff was injured.

The Supreme Court of Ohio made this the determining question in the case. In the opinion the question is discussed as follows:

> "There is some evidence in this record that shortly before his injury he was assisting in shifting a car containing interstate traffic en route for Meadville, Pennsylvania, but it also appears that after that service had been performed he had handled a caboose and placed it in 'Fitch's Pocket,' and there is no evidence whatever tending to show that this caboose was engaged in interstate commerce. There is also some evidence tending to show that the next service he would be required to perform would be in relation to cars engaged in interstate commerce, but what he had been doing before the time of the accident or what he might have done shortly thereafter, if the accident had not happened, is not very important in determining this question. The important inquiry is as to what he was doing at the time the accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior

orders of the master, and was at the time of the injury proceeding to the master's office for further orders and direction as to his service, so that he was not then and there employed in moving or handling cars engaged in interstate commerce. That service had been fully completed and ended, and he had not re-engaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would require would be of interstate character, cannot and does not establish the fact that at the time of the injury he was so engaged."

89 O. S., 88, 89.

In further elaboration of the facts, we call the court's attention to the following things appearing in the record:

The general duties of Mr. Welsh and the crew working under his directions were to do switching incident to distributing cars from trains coming into the Brier Hill yard from all over the Erie system, as well as to make up trains and switch cars going out to all points on the Erie system, including both interstate and intrastate movements (R., pp. 54, 55, 75). Immediately before Welsh was injured they had moved a car loaded with interstate freight, destined for New York, from Brier Hill yard to F. D. yard, near the passenger depot in the city of Youngstown, a point about one and a half miles from Brier Hill yard. Along with this car they took a caboose, and, after leaving the freight car at F. D. yard, they took the caboose to what is known as "Fitch's Pocket," a siding about three blocks beyond the point where they left the car. The record does not show whether this caboose was interstate or intrastate (R., pp. 24, 51, 52, 53, 74). After depositing the caboose the crew stopped at a water plug and took water (R., p. 53). Immediately after taking water they proceeded back to the Brier Hill yards, and it was at this time that Welsh was injured.

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Just as they entered the yard he stepped from the moving engine for the purpose of going into the yard-master's office to get further orders, all orders previously received having been filled. As he stepped from the engine, he stumbled over the interlocking and fell (R., pp. 53, 24, 25).

The orders which Mr. Welsh would have received had the accident not happened, and had he gone into the yard-master's office, as he contemplated when he stepped from the engine, were to make up a train for Sharon, Pennsylvania. These orders were, in fact, given the crew immediately after the accident, and were carried out by the crew (R., pp. 75, 55). After making up the train for Sharon the crew also switched other interstate freight, which would have been handled by Mr. Welsh had he not been injured (R., p. 55). It will be observed that Welsh and his crew were just completing a trip from the Brier Hill yard to F. D. yard and "Fitch's Pocket," about one and a half miles away; that in this trip they did three things:

(*a*) Handled an interstate car.

(*b*) Handled a caboose, which the record does not show to be either interstate or intrastate.

(*c*) Filled their tank with water, which water, as appears from their later switching, was used to generate steam utilized in handling interstate traffic.

It will be further noted that the engine had not came to a stop on this return trip, but was moving about two miles an hour when Welsh stepped off and was injured (R., p. 25).

It is our contention that whether the act that Welsh was doing, to wit, stepping from the engine for the purpose of going to the yard-master's office, be regarded as an act in completing the trip from Brier Hill yard to F. D. yard and "Fitch's Pocket," or whether it be regarded as the initial act in going to the yard-master's office for further orders,

makes no difference, and that in either case it was an act in furtherance of interstate commerce. The switching trip was clearly interstate, because it was necessary to move the car destined for New York. Going from the engine to the yard-master's office was likewise interstate, because the orders there actually awaiting related to interstate movements.

For the purpose of convenience we have classified various authorities under the following heads:

(*a*) *Repairing appliances used in interstate commerce.*

An employee carrying bolts to be used in repairing a railroad bridge.

Pedersen *vs.* Delaware, L. & W. R. Co., 229 U. S., 146; 33 Sup. Ct. Rep., 648.

See also:

Thomson *vs.* Columbia & P. S. R. Co., 205 Fed., 203.

A lineman repairing a telegraph line used in dispatching interstate trains.

Deal *vs.* Coal & Coke Ry. Co., 215 Fed., 285.

Employees engaged in repairing switches and side tracks over which interstate and intrastate commerce was carried.

Jones *vs.* Chesapeake & O. Ry. Co., 149 Ky., 566; 149 S. W., 951.

Truesdell *vs.* Chesapeake & O. Ry. Co., 159 Ky., 718; 169 S. W., 471.

An employee engaged in repairing, in a roundhouse, a car or engine used indiscriminately in intrastate and interstate commerce.

Northern Pacific Ry. Co. *vs.* Maerkl, 198 Fed., 1.

Missouri, K. & T. Ry. Co. *vs.* Denahy, 165 S. W., 529 (Tex., 1914).

Law *vs.* Illinois Central R. Co., 208 Fed., 869.

See also:

Gaines *vs.* Detroit, G., H. & M. Ry. Co., 148 N. W., 397 (Mich., 1914).

St. Louis & S. F. Ry. Co. *vs.* Conarty, 103 Ark., 421; 155 S. W., 93.

Baltimore & O. R. Co. *vs.* Darr, 204 Fed., 751.

A declaration for injuries to a railroad carpenter while tearing down a roundhouse was held to warrant the construction that the plaintiff was engaged in repairing an instrumentality used in interstate commerce, and, therefore, to be within the act.

Thomas *vs.* Boston & M. R. Co., 219 Fed., 180.

An employee repairing a track over which both interstate and intrastate trains were run was engaged in interstate commerce.

Lombardo *vs.* Boston & M. R. Co., 223 Fed., 427.

A roundhouse employee cleaning engines and operating turn-tables was engaged in interstate commerce, under the Federal Employers' Liability Act.

Cross *vs.* Chicago, B. & Q. R. Co., 177 S. W., 1127 (Mo.).

Where side tracks had been so far completed that they were used for interstate trains, the servant repairing them was engaged in interstate commerce within the Federal Employers' Liability Act.

Clark *vs.* Chicago G. W. R. Co., 152 N. W., 635 (Iowa).

An employee assisting in operating a steam shovel on the road-bed of an interstate railroad was employed in interstate commerce under the Federal Employers' Liability Act.

Tralich *vs.* Chicago, M. & St. P. Ry. Co., 217 Fed., 675.

An employee installing a block system upon the railway company's track, over which it was engaged in interstate commerce, was employed in interstate commerce under the Federal Employers' Liability Act.

Saunders *vs.* Southern Ry. Co., 83 S. E., 573 (N. Car.).

A workman repairing an engine which had been used in hauling both intrastate and interstate commerce and which was so used immediately afterwards was employed in interstate commerce and subject to the Federal Employers' Liability Act.

Winters *vs.* Minneapolis & St. L. R. Co., 148 N. W., 106 (Minn.).

(*b*) *On the way to and from work.*

A locomotive fireman walking to the place where he was to go on duty.

Lamphere *vs.* Oregon R. & Nav. Co., 196 Fed., 336.

A section hand riding to his camp at night after work.

San Pedro R. Co. *vs.* Davids, 210 Fed., 870.

An employee riding on a pass on his way home from work.

St. Louis S. W. Ry. Co. *vs.* Brothers, 165 S. W., 488 (Tex., 1914).

A section foreman of an interstate railway run down while helping his crew lift their hand car from the track for a train made up partly of cars bound for interstate points was held to have been engaged in interstate commerce within the Federal Employers' Liability Act.

Texas & P. R. Co. *vs.* White, 177 S. W., 1185 (Tex.).

Employees riding home on a push car.

Louisville & N. R. Co. *vs.* Walker's Admr., 162 Ky., 209; 172 S. W., 517.

An employee was killed while on his way to work. In an action to recover under the Federal Employers' Liability Act it was held that the administrator could prove that the decedent was employed in interstate commerce by proving that the switch engine on which he worked was used exclusively in interstate commerce during the shift, or was so used at the outset of the shift.

Knowles *vs.* New York, N. H. & H. R. Co., 150 N. Y. S., 99.

An engineer employed by a railroad company engaged in interstate commerce, who was injured by being struck by a train while going from the yards to his work, was employed in interstate commerce under the Federal Employers' Liability Act.

Missouri, K. & T. Ry. Co. of Texas *vs.* Rentz, 162 S. W., 959 (Tex.).

(*c*) *Preparing new appliances to be used in the future in interstate commerce.*

An employee engaged in building a new office in an old freight shed.

Eng *vs.* Southern Pacific Co., 210 Fed., 92.

An employee engaged in installing a block system to be used in signaling trains.

Grow *vs.* Oregon Short Line R. Co., 138 Pac., 398 (Utah, 1914).

A carpenter injured while working on an extension to a railroad repair shop was held to have been engaged in inter-

state commerce, as the old structure had been used as an instrumentality of interstate commerce.

Thompson *vs.* Cincinnati, N. O. & T. P. Ry. Co., 165 Ky., 256; 176 S. W., 1006.

(d) Other employments incidentally connected with the transportation of interstate commerce.

A seal clerk in a division yard inspecting and listing seals on an interstate train, preparatory to the distribution of its cars to other trains.

St. Louis, S. F. & T. R. Co. *vs.* Seale, 229 U. S., 156; 33 Sup. Ct. Rep., 651.

An employee oiling an engine which was to go on an intrastate journey and which was hauling two empty freight cars that had come from without the State.

North Carolina R. Co. *vs.* Zachary, 232 U. S., 248; 34 Sup. Ct. Rep., 305.

An engineer operating an engine on a trial trip after it had come from the repair shop, preparatory to an interstate journey.

Lloyd *vs.* Southern Ry. Co., 81 S. E., 1003 (N. C., 1914).

A section man sweeping snow from switches used by a train engaged in both interstate and intrastate commerce.

Hardwick *vs.* Wabash R. Co., 168 S. W., 328 (Mo., 1914).

A brakeman engaged in switching cars destined from one State to another, though the train on which he was engaged made only an intrastate journey.

Nashville, C. & St. L. R. Co. *vs.* Banks, 156 Ky., 609; 161 S. W., 554.

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The crew on an intrastate train containing one or more cars billed to points without the State.

Fernette *vs.* Pere Marquette R. Co., 144 N. W., 834 (Mich., 1914).

A brakeman employed on a train made up largely of interstate cars, but at the time of the injury engaged in switching an intrastate car, preparatory to putting it in the train.

Thornbro *vs.* Kansas City, M. & O. Ry. Co., 139 Pac., 410 (Kan., 1914); affirmed on rehearing, 142 Pac., 250.

A fireman engaged in shifting intrastate cars to be put in a train made up partly of interstate cars.

Southern Ry. Co. *vs.* Jacobs, 81 S. E., 99 (Va., 1914).

A conductor returning on an intrastate trip on a shuttle train which had transported interstate commerce on its outward trip.

Perry *vs.* Illinois Central R. Co., 143 N. W., 724 (Minn., 1913).

Also, 150 N. W., 382.

A section hand asleep at night in a car on a side track.

Sanders *vs.* Charleston & W. C. Ry. Co., 81 S. E., 283 (S. C., 1914).

An engineer at a station for pumping water to be used by engines engaged in interstate commerce.

Horton *vs.* Oregon-Washington R. & Nav. Co., 72 Wash., 503; 130 Pac., 897.

A member of a switching crew unloading from a car oil to be used as fuel for engines regularly engaged in interstate commerce.

Montgomery *vs.* Southern Pac. Co., 64 Ore., 597; 131 Pac., 507.

An employee assisting in the movement of water or coal to be consumed by engines used in interstate commerce.

Barker *vs.* Kansas City, M. & O. Ry. Co., 88 Kan., 767; 129 Pac., 1151; 43 L. R. A. (N. S.), 1121.

A brakeman getting ice to cool a hot-box on an interstate train.

Illinois Central R. Co. *vs.* Nelson, 203 Fed., 956.

An employee engaged in loading tobacco on a car to be transported in interstate commerce.

Illinois Central R. Co. *vs.* Porter, 207 Fed., 311.

A railway special watchman, who removed trespassers from an interstate train and was injured just after he alighted from the train to drive the trespassers from the yard, was still employed in interstate commerce at the time of his injury.

Smith *vs.* Industrial A. C. of California, 147 Pac., 600 (Cal.).

A brakeman engaged in hauling empty cars between States was held to be employed in interstate commerce.

St. Louis S. W. Co. *vs.* Anderson, 173 S. W., 834 (Ark.).

Where the decedent, a switchman, just prior to his death had been handling cars containing both intrastate and interstate freight, the jury were authorized to find that he was employed in interstate commerce under the Federal Employers' Liability Act.

Pittsburgh, C., C. & St. L. Ry. Co. *vs.* Glinn, 219 Fed., 148.

An employee unloading coal into chutes for interstate trains was, while unloading and while waiting to unload cars,

engaged in interstate commerce within the Federal Employers' Liability Act.

Kamboris *vs.* Oregon-W. R. & N. Co., 146 Pac., 1097 (Ore.).

An employee firing an engine in New Jersey, preparatory to attaching it to a train for New York, was held to be engaged in interstate commerce within the Federal Employers' Liability Act.

Tonsellito *vs.* New York C. & H. R. R. Co., 94 Atl., 804 (N. J.).

A railway company and its car inspector were held to have been engaged in interstate commerce within the Federal Employers' Liability Act when the inspector was helping to clear a yard wreck.

Southern Ry. Co. *vs.* Puckett, 85 S. E., 809 (Ga.).

Laborers on a trestle used by a railroad company in intrastate and interstate commerce were engaged in interstate commerce.

Louisville & N. R. Co. *vs.* Walker's Amr., 162 Ky., 209; 172 S. W., 517.

A yard clerk whose duty it was to make records of interstate cars, was employed in interstate commerce.

Pittsburgh, C., C. & St. L. Ry. Co. *vs.* Farmers' T. & S. Co., 108 N. E., 108 (Ind.).

A signalman whose duties were connected with electric signals controlling the operation of both interstate and intrastate trains, was employed in interstate commerce.

Cincinnati, N. O. & T. P. Ry. Co. *vs.* Bonham, 171 S. W., 79 (Tenn.).

An employee who was injured while wheeling coal for shops in which other employees were engaged in repairing

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cars used in interstate commerce was employed in interstate commerce under the Federal Employers' Liability Act.

Cousins *vs.* Illinois C. R. Co., 148 N. W., 58 (Minn.).

An employee injured while coaling an engine in Missouri, which was then being prepared for service in hauling freight from Missouri to Kansas, was employed in interstate commerce.

Armbruster *vs.* Chicago, R. I. & P. Ry. Co., 147 N. W., 337 (Iowa).

An employee acting as watchman of a dead engine, which was being hauled by an interstate train from one State to another, was employed in interstate commerce within the purview of the Federal Employers' Liability Act.

Atlantic C. L. R. Co. *vs.* Jones, 9 Ala. App., 499; 63 So., 693.

A brakeman in a switching crew whose general duties were to use a locomotive in moving indiscriminately cars used in local and interstate commerce was employed in interstate commerce, even though injured while coupling the locomotive to a private car used wholly within the State.

Oberlin *vs.* Oregon-W. R. & N. Co., 142 Pac., 554 (Ore.).

The railway and its switching crew moving interstate cars between points in a city were engaged in interstate commerce within the Federal Employers' Liability Act.

Vandalia R. Co. *vs.* Holland, 108 N. E., 580 (Ind.).

A switchman employed in interstate commerce and so employed at the time of the accident was killed by an intrastate car, due to negligence as to a brake-step on an intrastate car. It was held that the Federal Employers' Liability Act applied.

Crandall *vs.* Chicago, G. W. R. Co., 150 N. W., 165 (Minn.).

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In the following cases attention is particularly called to the test applied in determining when an employee is engaged in interstate commerce:

St. Louis, San Francisco & Texas Ry. *vs.* Seale, 229 U. S., 156, 159*ff.*:

> "The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains. * * * At the time of his injury and death he was on his way through the yard to one of the tracks, therein to meet an incoming freight train. * * * The purpose with which he was going to the train was that of taking the numbers of the cars and otherwise performing his duties in respect of them. While so engaged he was struck. * * * In our opinion, the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not only indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further, or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the State line."

Pederson *vs.* Del., Lackawanna & Western R. R. Co., 229 U. S., 146, 150*ff.*:

> "Plaintiff and another employee * * * were carrying from a tool car to a bridge * * * some bolts or rivets which were to be used by them that night or very early next morning in repairing that bridge, the repair to consist in taking out an existing

girder and inserting a new one. * * * These bridges were being regularly used in both interstate and intrastate commerce. * * * That the defendant was engaged in interstate commerce is conceded, and we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. * * * The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * True, a track or bridge may be used in both interstate or intrastate commerce, but when it is so used, it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair, or in keeping it in suitable condition for use, from being an employment in interstate commerce.

"The point is made that the plaintiff was not at the time of his injury engaged in removing an old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

N. Y. Central & Hudson River R. R. Co. *vs.* Carr, 238 U. S., 260, 262; 35 Sup. Ct., 780:

Carr was a brakeman on a "pick-up" freight on which some of the cars contained interstate freight. Two cars were cut out of the train and backed into a siding, during which process Carr was injured.

> * * * "Many arguments have been advanced by the railway company to support its contention that as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employee at the moment of the injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. * * * In performing this duty, it was necessary to set the brake of the car still attached to the interstate engine, so that when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employees, on its interstate journey. * * * (Ill. Central Ry. *vs.* Behrens, 223 U. S., 273, is distinguished: 'Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in the act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof.')"

N. C. R. R. Co. *vs.* Zachary, 232 U. S., 248, at 260:

Plaintiff's intestate was engaged as fireman in preparing his engine for a trip and attempted to cross certain tracks to go to his boarding-house, a short distance away. While crossing he was struck and killed by another engine.

"It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. * * * Again it is said that because deceased had left his engine and was going to his boarding-house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming * * * that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for that purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

Johnson *vs.* Southern Pac. Company, 196 U. S., 1:

"Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use. * * * Confessedly this dining car was under control of Congress while in the act of making its interstate journey, and in our judgment, it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and was within the law" (*i. e.*, Automatic Coupler Act).

P., B. & W. *vs.* Tucker, 35 App. D. C., 123, affirmed in 220 U. S., 608:

> "When Tucker was killed he was upon the premises of the defendant in response to its call to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that under such circumstances, the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master."

Lamphere *vs.* Oregon R. R. & Nav. Co., 196 Fed., 336, 338:

Fireman ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train, and when approaching the station from a crossing was struck and killed.

> "The deceased when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit: to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death * * *. Must a fireman be actually in his place of duty on the locomotive of the train which is engaged in com-

> merce between the States in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the track and take his place on another train engaged in interstate commerce and he is injured while on the way, will it be said that he was not employed in interstate commerce when received the injury?" * * *

After quoting from Mondou *vs.* N. Y., N. H. & Hud. R. R. Co., 223 U. S., 1, the court (p. 340) says:

> "As indicated in the opinion, the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce? To that question we think there can be but one answer. Under the imperative command of his employer, the deceased was on his way to relieve, in the capacity of fireman, the crew of a train which was carrying interstate commerce, and the effect of his death was to hinder and delay the movement of that train."

P., C., C. & St. L. Ry. Co. *vs.* Glinn, 219 Fed., 148:

> "At the moment the switch engine was not hauling any cars, and so the true character of the employment can be determined only by a broader view. The evidence showed that the railway company, in and about these yards, was continuously and indiscriminately hauling intrastate and interstate freight, and that in this part of the work no distinction whatever was made between the two classes."

After citing Supreme Court cases the court says, page 150:

"The way in which they have interpreted the statute, save that liability is created where the service being rendered is of a general, indiscriminate character, not segregated and tied to shipments within the State (as in the Behrens case) * * *, but applicable at least as well to the interstate commerce which the carrier is conducting."

San Pedro, L. A. & S. L. R. Co. *vs.* Davids, 210 Fed., 870:

"The work which he had been doing on the day on which he was injured was undoubtedly work done in interstate commerce. * * * And, although at the time when he was injured, he was returning to camp at the conclusion of his day's labor, he was doing so at the direction of his employer. He got upon the hand car on which he rode under the order of the section foreman, to take it back to a certain designated place on the line of the road. He was not only engaged in returning from his place of work to the camp maintained by the company, but he was engaged in taking the hand car to a point where it was to be removed from the track so as to leave the road open to the passage of trains. He had not been discharged from his day's work. He was still acting under orders of the section foreman. * * * And if, as held in the Pedersen case, a railroad employee is engaged in interstate commerce when he is merely carrying material for repair to the place where a bridge used in interstate commerce is being repaired, or, as held in the Lamphere case * * * an engineer is engaged in interstate commerce while proceeding on the right of way under orders to take charge of a train engaged in interstate commerce, no reason is perceived why a section hand, engaged in propelling a hand car furnished him by the railroad company to convey him to his camp, as the concluding part of his daily service of ballasting a track used in traffic between States, is not while so doing engaged in interstate traffic."

Thompson *vs.* C. & P. S. R. Co., 205 Fed., 203, at 205:

* * * "It is equally clear that the man who is at work, either trying to save a partly demolished

bridge of a railroad carrying interstate commerce, or employed in repairing it, is also so employed. The latter's work is one to restore and prevent the further interruption of interstate commerce. His injury or death while so employed, would further interfere with that commerce."

Zikos *vs.* Ore. R. & Nav. Co., 179 Fed., 893, 898:

"But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other."

Kamboris *vs.* Ore.-Wash. R. & Nav. Co., 146 Pac., 1097 (Oregon):

"In the case at bar we cannot see why the act of furnishing the coal for fuel and placing the same in the pockets of the chute to be used partly in the engines engaged in interstate traffic, was not just as essential in the matter of running interstate trains as the act of taking the same out of said chute or pockets and placing it upon the tenders of the engines, or any other act of the employee's in running the engines and trains transporting such commodities. If it were impossible to fill the position of the deceased, and the coal was not furnished, interstate commerce would stop or be retarded to that extent, and it clearly seems to us that the general duties of the decedent, as well as the act he was performing at the particular time of the injury, had a very substantial bearing upon and relation to interstate commerce. It could not be said consistently that the decedent was not engaged in his duty because he was waiting for the cars to approach the proper place in order to block the wheels. It might as well be said that a switchman was not engaged in his duty while waiting for a train to pass a switch in order to turn the same. The act of placing the cars of coal in the chute was similar to decedent's general duty of shoveling coal, and was a necessary service in preparing fuel for the engines hauling the interstate trains."

Southern Ry. Co. *vs.* Jacobs, 81 S. E., 99, 100 (Va.):

> "It is true, that at the precise moment of the injury, Jacobs, the man who was injured, was engaged with a crew in shifting cars * * * at the moment of the accident * * * engaged in intrastate commerce, * * * but it is also true that the shifting and movement of the cars at the time had for its object the making up of a train to which cars were to be attached * * * which were laden with interstate shipments; and these facts, we think, bring the case fairly within the influence of the Pedersen case."

Lloyd *vs.* So. Ry. Co. *et al.*, 81 S. E., 1003, 1007 (N. C.):

> "The plaintiff was overlooking his engine expecting to take it out that day or the next * * *. His work was done not only in the preparatory stage of interstate commerce, but was a part of it. The case in this respect is governed by N. C. R. R. Co. *vs.* Zachary, 232 U. S., 248."

Baltimore & O. R. Co. *vs.* Whitacre, 92 Atl., 1060, 1063 (Md.):

The court cites the Zachary case and says:

> "Certainly the act of the fireman in going to his boarding-house was no more an act connected with interstate commerce than was the act of Whitacre in hunting for a tool boy in order to obtain a tin cup for the use of the crew on its trip."

Barlow *vs.* Lehigh Valley R. Co., 107 N. E., 814 (N. Y.):

The syllabus reads:

> "An engineer of a switch engine, switching coal cars, transported from another State on the railroad's own track, so that they can be placed on a trestle and the coal taken indiscriminately for engines employed in interstate or intrastate commerce, is engaged in interstate commerce."

The court, after holding the facts in this case to bring the plaintiff within the interstate commerce as an act so closely

connected with interstate commerce as to be a part of it, cites the Pedersen case, then the Behrens case, and says:

> "I shall assume * * * that the fireman had started to back the engine down the incline from the trestle when the accident occurred. Still the particular service in interstate commerce was not completed. The rule governing the case could not be changed by the mental determination of some one in authority to put the crew at intrastate work upon the return of the engine to the yard. The case in that aspect is the converse of the Behrens case. It is an anomalous situation, and one to be remedied as far as possible by legislation, that an employer's liability to his employee may be governed by one rule at one moment and by an entirely different rule at the next, though the employee is all the time engaged in precisely the same kind of work. We are not disposed to increase the difficulty by drawing nice distinctions. While returning from the performance of a particular service in interstate commerce, the employee should be regarded as still engaged in that service."

Willever *vs.* Delaware, L. & W. R. Co., 94 Atl., 595 (N. J.):

Decedent, section foreman of the defendant company, and he and the men employed under him, were required to keep in order the tracks and switches in the yard. Shortly before the accident occurred he was at work with his gang repairing certain switches in the yard. He left these switches to go to some other point in the yard—where or for what purpose the evidence does not show. Court held the present case cannot be distinguished from the Pederson case in its legal essence.

Atlantic Coast Line R. Co. *vs.* Jones, 63 So., 693, 698 (Ala.):

> "If the plaintiff's services were necessary in the capacity in which he was acting for his employer (and we may assume from the fact of his employment that they were), then the defendant, his em-

ployer, being engaged at the time of the injury in carrying on interstate commerce, the effect of the personal injury to plaintiff, incapacitating him for the duties of his employment, tended to delay or hinder the movement or impede the progress or safety of the train engaged in interstate commerce, and would come under the purview of the Federal Employers' Liability act."

Freeman *vs.* Powell, 144 S. W., 1033, 1035 (Tex.):

> "Appellant's employment had direct relation to the commerce, to wit: the two interstate passengers which the train in question transported. The service performed directly contributed to the comfort and necessity, not only of the local, but of the interstate, passengers, and we therefore think his employment comes well within the authorities on the subject that we have been able to find."

Jones *vs.* Chesapeake & O. Ry. Co., 149 S. W., 951, 953 (Ky.):

The court cites the leading authorities on the subject, quoting especially Moudou *vs.* N. Y., etc., R. Co., 223 U. S., 1, quoting:

> "As indicated in the opinion, the test question in determining whether the personal injury to an employee of the railroad is within the purview of the act is, What is its effect upon interstate commerce? Does it have an effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of the train engaged in interstate commerce?"

Miss., K. & T. Ry. Co. of Texas *vs.* Rentz, 162 S. W., 959 (Tex.):

This case cites many authorities on the point that the employee is within employer's service when he is present to

perform his duties as servant and subject to orders, though at a given time he may not be engaged in the actual performance of a duty.

St. Louis, Southwestern Ry. Co. *vs.* Brothers, 165 S. W., 488-9 (Tex.):

> "Under the terms of his employment, he was at all times subject to the call of his master for the performance of such duties as should be assigned him in line with such employment. When called to duty, his time and pay was allowed until he returned to Commerce (his home and place of employment), whether actually at his work or not. * * * The following morning he was directed to proceed back to Commerce and report for duty. He did so (being injured en route), arriving at Commerce about 1 p. m., going out on duty again at midnight on another extra run. Also, as we have said, he did no actual work in the operation of the train, but occupied a seat in a coach as any other passenger."

The court then concludes that he was within his employment, and that the Federal Employers' Liability act applied:

> "In the instant case, transportation over appellant's line of railway was the means afforded Brothers for the performance of his service, and it was only because he was the employee of appellant that he was entitled to such right and privilege."

Louisville & N. R. Co. *vs.* Walker, admr., 172 S. W., 517, 519 (Ky.):

> "We think, however, that if he should be considered at that time as an employee at all, he was an employee engaged in interstate commerce, because this was the only kind of employment in which he was engaged. At the time of his death he was either an employee engaged in interstate commerce or he was a mere licensee using the tracks of the company in going from his place of work to the boarding car. It is very clear that while actually engaged at work for

the company, he was an employee engaged in interstate commerce, and we think it equally clear that the moment his day's work ended he was not thereby converted into some other kind of an employee, but that he either retained his character as an interstate employee, or became, when his work ended, and while going to the boarding car in the circumstances stated, a licensee. After giving to this question careful consideration, our opinion is that in going from his place of work to his boarding car he continued in the character of an employee of the company, engaged in interstate commerce. * * * We, therefore, have a case in which the employee not only worked for the company in the daytime, but ate his meals and occupied at night a place on its premises set apart by the company for his use and accommodation. And so we think that under these circumstances, an employee such as Walker was, should be treated as engaged in interstate commerce, not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the company. In other words, within the contemplation of the act, the course of his employment covered not only the time he was actually engaged at work, but the time he was engaged in going to and from his work."

Neil *vs.* Idaho & W. N. R. R., 125 Pac., 331-336 (Idaho):

"While it may not have been his duty and was carelessness on his part, under the facts of this case, to walk upon said 'scale track,' still we think he was engaged in interstate commerce to the extent of getting his train ready for that purpose. It seems to us that preparation was being made to have his train leave Spirit Lake and that he was engaged in getting his train ready for the transportation of freight both within the State and beyond its boundaries, and that he was 'engaged in interstate commerce,' within the meaning of that term, as used in the act of Congress."

Horton *vs.* Ore.-Wash. R. & Nav. Co., 130 Pac., 897-900 (Wash.):

The court cites the authorities at length and then says:

> "But it is urged that, even assuming that the employment of the deceased when actually pumping water was so related to interstate commerce as to meet the requirements of the act, still he was not so employed while going to his work. It is argued that the decedent, at the time of his death, was not 'actually and actively engaged in interstate commerce.' The word, however, used in the act itself, as applied to the servant, is 'employed.' It is somewhat difficult to see how he could have been passively employed, or employed at all, without being actually employed. The act itself places no such tautological emphasis upon the word 'employed.' The deceased was going to the pumping station by the means supplied by the master. He was performing a necessary part of his employment in the manner contemplated by the master."

The court then holds that the Lamphere case is decisive of the present one. The court then further says:

> "Tested by * * * the effect of the injury upon interstate commerce, it seems to us too plain for cavil that the deceased when killed was employed by the carrier in such commerce, within the meaning of the act. Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce? There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If, when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by the master, as well as the local trains, must have ceased altogether. This demonstrates the 'real or substantial' connection of his employment with such commerce. There can be no possible distinction in the relation of interstate com-

merce between the employment of the fireman who stokes the engine hauling the train so engaged and that of the man who pumps the water for the same engine. The engine would not run without the service of either. If there is a distinction, it is too finespun and diaphanous for ordinary perception. To hold that there is any material distinction would be as unjust as artificial. The pumper's relation to actual transportation of interstate freight and passengers is much more direct and intimate than that of a car repairer or repairer of an engine tender, who bestows his labor on instrumentalities while they are, so to speak, temporarily out of commission. To allow a recovery to these, and not to the pumper supplying the water for motive power in actual transportation, would smack of caprice."

Montgomery *vs.* Southern Pac. Co., 131 Pac., 507, 510 (Oregon):

"Was not the act which plaintiff was performing at the time of the accident just as essential to interstate commerce as the repairing or the pulling of the throttle of an engine used in such traffic? It was a necessary act in the transmission of interstate freight, and all who co-operated in the work were engaged in interstate commerce within the meaning of the act of Congress. It was closely connected with his general duties. Oil is the food that gives life and strength to the engine, furnishing the motive power for the transportation of interstate freight, and by the aid of which a stream of commerce flows from State to State and from State to foreign nations. To illustrate; draw a line to represent the boundary between two States; draw another line, crossing the first, to represent the stream of interstate commerce. Whatever act in a substantial manner aids, accelerates, or increases the amount of, or furnishes a part of the supply for, such stream, and is connected therewith, to the same extent may be said to aid, support and maintain the act of interstate commerce. Such labor makes interstate commerce more secure, more reliable and more effective. Suppose that all the agents engaged in providing oil to be used as fuel in

interstate commerce upon a railroad, as this oil was destined to be used, should cease to act * * * and there were a failure of the supply of fuel and both the switch and interstate engines were compelled to stop, the stream of interstate commerce would also stop or be lessened to the same extent. What court or lawyer would say that under these circumstances, there was not a substantial interference with interstate commerce?"

Thornbro *vs.* Kansas City, M. & O. Ry. Co., 139 Pac., 410, 413 (Kansas):

"Referring to the test applied in the Lamphere case—Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of the train engaged in interstate commerce?"—an affirmative answer is as obvious here as there. Delay is a necessary incident to such a calamity, and delay in fact occurred. The regular movement of the train was interrupted to switch the defective car back upon the house track, where it was left, and the promptings of common humanity required attention and care for the body, which were doubtless given. The train was deprived of a brakeman. All this tended to hinder and cripple interstate transportation. It cannot be doubted that the work of the deceased had a real and substantial relation to interstate commerce."

Berlin *vs.* Ore.-Wash. R. & Nav. Co., 142 Pac., 554, 556 (Oregon):

"The test indicated by this utterance of the United States Supreme Court (citing 223 U. S., 1) in determining whether the act in question is subject to the Federal legislation upon the subject is whether or not the operation of interstate commerce by the defendant is affected by the injury to the employee. Bearing in mind that the crew of which the plaintiff was a member was engaged habitually with the locomotive in question in handling cars of all kinds going into

the yard of the defendant, whether interstate or intrastate, without distinction, it must be apparent that the efficiency of the defendant's force of employees engaged in interstate commerce was appreciably impaired by the injury happening to the plaintiff. Under the circumstances the two kinds of trade were so intimately and inseparably commingled, that it is impracticable to say that at one moment the plaintiff is engaged in one kind of traffic and at the next in the other. The statute is remedial in its nature, and is to be construed liberally."

Armbruster *vs.* Chicago, R. I. & P. Ry. Co., 147 N. W., 337, 346 (Iowa):

"In the light of these decisions, we reach the conclusion that the deceased was employed in interstate commerce at the time of receiving the injury. True, the engine had not been attached to the train at the time, but it was being prepared for that purpose, and it was attached shortly thereafter and actually hauled freight into another State. It is suggested that the engine whose tender was being coaled, was not shown to have been assigned to haul the particular train, and that the work may have been done generally, but we think any such inference was obviated by the proof of the actual use made of it and the absence of evidence that engines were being so prepared generally without reference to when they were to be employed."

Graber *vs.* Duluth S. S. & Ky. Co., 150 N. W., 489 (Mich.):

The facts are very similar to the case at bar.

"Plaintiff was in its employ, his business, in the main, being that of a brakeman. * * * The remaining duty for the day was to sidetrack the cars, put away the engine in the roundhouse, locate and properly close the caboose, and do work in the yard, if time should permit, and such were the orders from the conductor. After his train work was done, pursuant to duty, he set the brakes on some cars on the sidetrack so they would not be unduly disturbed by

the movement of the through train which was about to exercise the necessary movements to take in some cars and prepare to proceed upon its course. It was an interstate train. After doing such work, plaintiff proceeded to a nearby saloon, off the right of way, to get a drink. * * * It was a cold day, and plaintiff had been out so long that he felt in need of refreshments. When he had last seen his conductor, of whom it was his duty to inquire as to further orders before going to supper, he was at the depot. After getting the drink plaintiff started for the depot, for the purpose of obtaining final instruction, and then going to supper at a place on the right of way, on the depot side of the standing train. Such train had completed the required switching, taken in several cars, and the engine was about to be spotted at the water tank to take in a supply of water and be in readiness to depart. As plaintiff reached the train and was in the act of climbing through between two gondola cars, without any signal being given, it was suddenly started, whereby his right foot was caught * * * (p. 491). Those engaged in carrying on such commerce, either as principal or employee, are engaged in interstate commerce, and one while actually performing a service essential to or so closely connected with such business as to be substantially a part of it,—an act in the carrier service of the interstate work,—though not necessarily exclusive of all intrastate features, is in the performance of interstate service in the carrying on of interstate commerce, within the meaning of the Federal Employers' Liability Act."

Further:

"All work so closely related to interstate commerce business as to be practicably inseparable from it, though it promotes, at the same time, intrastate business, is in reality and legal effect a part of the former."

Further:

"Any brief incidental absence from the scene of work or instrumentality used therein, which is not

> inconsistent with the employee's duty to his employer, does not, necessarily, preclude his efficiently claiming to be still on duty and engaged in interstate commerce (N. C. R. R. Co. *vs.* Zachary, cited). Neither the period or nature or continuity of service is changed by such a brief stepping aside from or cessation of activity as that of customarily visiting a wayside place for a lunch, or for other legitimate and common means of refreshment, or waiting after one task shall have been done, for orders as to the next movement—the employee all the time being within customary reach for continuance of the day's service, and holding himself in readiness to immediately respond."

Saunders *vs.* Southern Ry. Co., 83 S. E., 573 (N. C.):

> "Was the intestate of the plaintiff employed in interstate commerce at the time of his death? He was an employee of the defendant engaged in installing a new and improved block system along the track of the defendant in place of another system already in use, and at the time of his death, was returning to his work train, from which he had been absent for a necessary purpose only a few minutes, and it is admitted that the defendant was engaged in interstate commerce over said track. Upon these facts two recent decisions of the Supreme Court * * * (Railroad *vs.* Zachary, 232 U. S., 248; Pederson *vs.* R. R., 229 U. S., 146), compel us to answer in the affirmative. * * * We think it clear that one employed in installing and equipping the road with the block signals was engaged in doing something which was a part of the interstate commerce in which the defendant was engaged, to the same extent as one engaged in repairing a bridge or a track in such commerce."

Tested by the rule laid down by this court in the Pedersen case, it seems to us that the findings of the Supreme Court of Ohio cannot be sustained. In singling out the movement of the caboose, and in laying stress upon the fact that Welsh, at the time of his injury, had no orders, but was on his

way to get orders, we think the learned court has proceeded upon the assumption "that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others, or to the business as a whole." As pointed out by this court in the Pedersen case, "this is an erroneous assumption. The true test always is: is the work in question a part of the interstate commerce in which the carrier is engaged?"

The effect of the holding of the Supreme Court of Ohio is to narrow and limit the application of the Federal statute to those cases where the employee is directly engaged "in moving or handling cars engaged in interstate commerce" (Opinion, 89 O. S., 88).

The view of the learned court seems to be that before the Federal statute applies the employment must consist in actually handling "or assisting in handling cars engaged in interstate commerce, either by taking them out of or putting them into trains, or shifting them about the various parts of the railway yards" (Opinion, 89 O. S., 87).

We do not think that the scope of the statute can be so narrowed. As in the Pedersen case, there are many acts of many employees who never come into actual physical contact with or participate directly in the moving of interstate commerce, and yet are of such character as to further the transportation of interstate freight, and without which an interstate railway could not operate at all. It is our contention that the act of an employee which makes possible the moving of an interstate shipment is just as essentially an act of interstate commerce as is the actual moving of the freight. Ask the questions suggested in the Pedersen case regarding the situation in the case at bar: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier" (229 U. S., 146; 33 Sup. Ct. Rep., 648, 649).

Is not the answer as equally obvious here as in the Pedersen case? The return from F. D. yard was certainly not independent of the movement of the New York car. It was so closely connected therewith as to be a part of it. So, also, was the act of going to the yard-master's office so closely connected with interstate commerce as to be a part of it. The performance of that act was not a matter of indifference so far as that commerce was concerned.

Welsh, being employed on an interstate railroad, at a terminal point, engaged generally in making up trains and distributing cars, as a part of his duties was required to procure orders before he could accomplish his work. Also, after completing the actual moving of an interstate car, he was required to return to Brier Hill yard in order to perform his further duties.

So that, viewed from any angle, we submit that the act of stepping from the engine in completion of the trip to F. D. yard, and preparatory to going to the yard-master's office for further orders, was an act so closely connected with interstate commerce as to be a part of it, and its performance was not a matter of indifference so far as that commerce was concerned. In other words, it was a "part of the interstate commerce in which the carrier was engaged."

Therefore we respectfully submit that the judgment of the Supreme Court of Ohio should be reversed and this cause remanded for further proceedings consistent with the application of the Federal statute.

Respectfully submitted,

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Received copy of the above brief this 31st day of December, 1915.

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SUPREME COURT, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]29

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

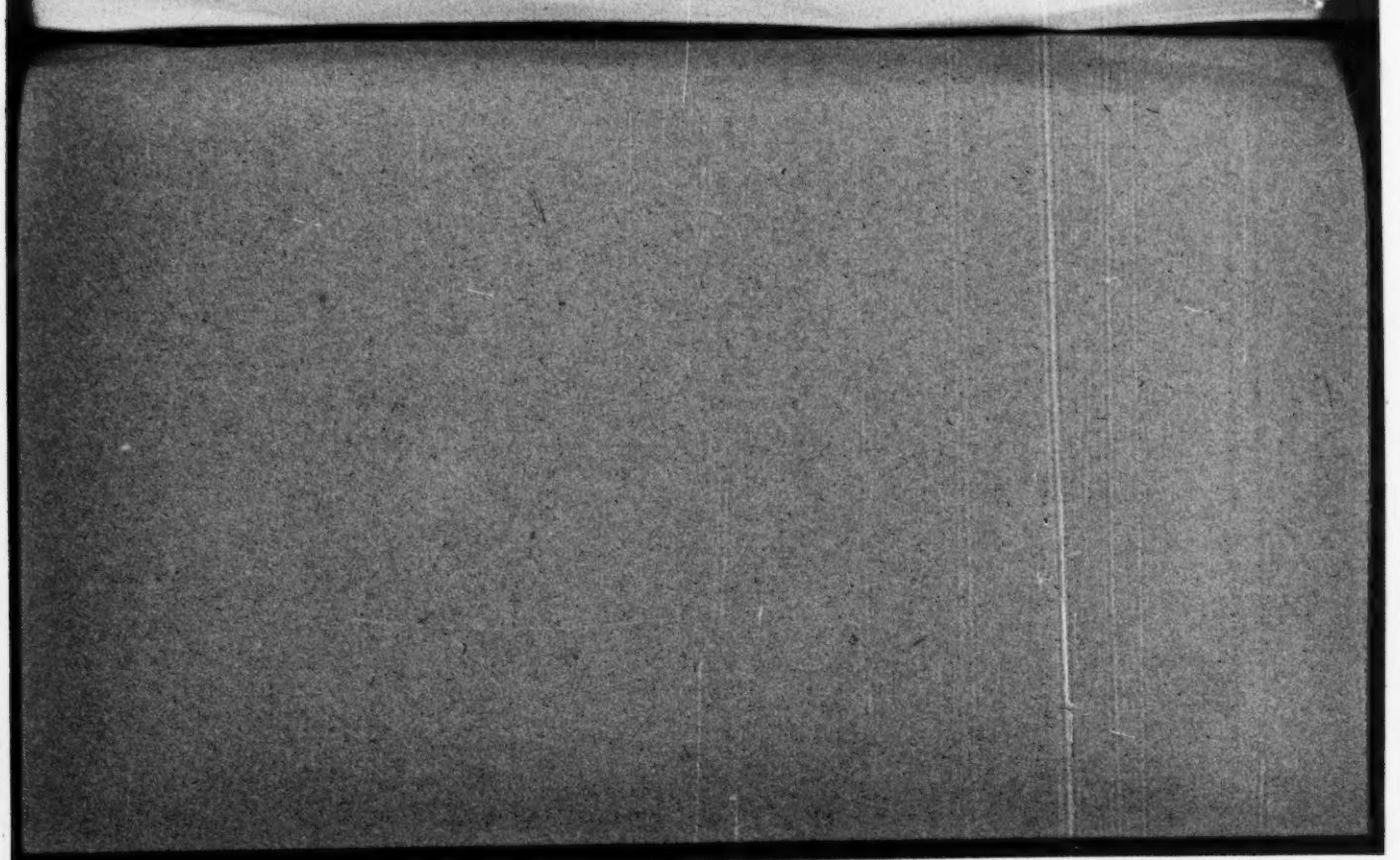
JAMES T. WELSH, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

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(24,304)



INDEX.

	Page
Statement of case	1
Assignment in errors	5
Synopsis of argument	7
No contention as to Federal Employers' Liability Act being exclusive where applicable	7
Argument	7
Plaintiff was engaged in intrastate commerce when he was injured	7
Facts	9
Authorities	14
Opinion of the Supreme Court of Ohio	19
Conclusion	20

List of Authorities.

Bay *vs.* Merrill Ring Lumber Co. (211 Fed., 717)	15
Boyle *vs.* Pennsylvania R. Co. (221 Fed., 453)	15
Corbett *vs.* Boston & M. R. R. (107 N. E., 60)	14
Erie R. Co. *vs.* Jacobus (221 Fed., 335)	15
Erie R. Co. *vs.* Welch (89 O. S., 81)	20
Hamuill *vs.* Pennsylvania R. Co. (N. J.) (49 Atl., 313)	10
Hench *vs.* Pennsylvania R. Co. (1914) Atl., 1056 (246 Pa., 1)	17
Ill. Central R. Co. *vs.* Rogers (221 Fed., 52)	16
Ill. Central R. Co. *vs.* Behrens (233 U. S., 473)	15
Ill. Central R. Co. *vs.* Behrens (217 Fed., 967)	15
Louisville & N. R. Co. *vs.* Strange (156 Ky., 439) (161 S. W., 239)	14
McAuliffe *vs.* N. Y. C. & H. R. Co. (150 N. Y. S., 512)	18
N. Y. C. R. Co. *vs.* Zachary (232 U. S., 248)	15
Norton *vs.* Erie R. Co. (148 N. Y. S., 769)	14
Norton *vs.* Erie R. Co. (163 App. Div. N. Y., 468) (148 N. Y. S., 769)	17
Parsons *vs.* Del. & H. Co. (153 N. Y. S., 179)	16
Patry *vs.* Chicago & W. I. R. Co. (106 N. E., 843)	14
Pederson *vs.* D., L. & W. R. Co. (229 U. S., 146)	11
Pennsylvania R. Co. *vs.* Knox (218 Fed., 748)	14
Saunders *vs.* Southern Ry. Co. (83 S. E., 573)	14
Shanks *vs.* Del., L. & W. R. Co. (163 N. Y. App. Div.) (148 N. Y. S., 1034)	15
Southern Ry. Co. *sv.* Murphy (9 Ga. App., 190)	15
Thornton's Federal Employers' Liability Act	10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 198.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES T. WELSH, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

On March 7, 1911, James T. Welsh, a yard conductor in the employ of the Erie Railroad Company, stepped off a locomotive, which was moving slowly, upon a pulley wheel of the interlocking system, which wheel turned under his weight, entangled his feet in the wires connected therewith, thereby throwing him under the wheels of the locomotive, crushing his right arm.

The pulley wheel and wires were located in what was known as the runway or path between tracks where train-

men were required to walk and work (R., p. 22). The accident occurred at 11.30 o'clock at night, during a blinding snowstorm, which had completely covered the pulley wheel and wires from view (R., pp. 26, 27, 40).

Welsh was yardmaster of the Brier Hill Yard, which was about a mile long and located some distance west of the yardmaster's office (R., p. 60), and had never seen and did not know said wires were located at the place he was injured east of the yardmaster's office (R., pp. 26, 33, 44), as they were two little black telephone wires located two and one-half inches above the ballast of the same color.

Immediately before the accident Welsh and his crew took a car of merchandise and a caboose from the Brier Hill Yard eastward about a mile and one-half to the F. D. Yard, where he left the merchandise car on a side track, then proceeded to the main track with locomotive and caboose, and proceeded eastward to "Fitch's Pocket," where he placed the caboose on a siding, and while returning to the yardmaster's office for further orders was injured. The car of merchandise was consigned to Meadville, Pa., and it was first delivered and placed on side track No. 1, near the Erie freight house. After this was done Welsh returned to the main track and took the caboose "on down to what they call Fitch's Pocket—goes to Fitch's warehouse" (R., pp. 24, 53), and after he had delivered the caboose and was on his way to the yardmaster's office to get his orders, the accident occurred. The tracks immediately in front of the office for some distance east and west consisted of main tracks.

Welsh had been in the employ of the railroad company for about fourteen years, working in different yards as a trainman and conductor, and also as a yardmaster, a day at a time (R., p. 28), for about a month, three years before the accident.

Nearly all of the work done by Welsh was in the night, and when he went to the office to get his orders he approached the same from the Brier Hill Yard, from the west, and did

not pass the pulley and wires (R., pp. 32, 33) and there was no signal or device to call his attention to the location of this danger in the middle of the runway. The pulley and wires could easily have been covered in such a manner as to make the walk and way safe in the night time (R., p. 74).

He filed his petition in the Common Pleas Court of Mahoning County, claiming: "That said pulley wheel and wires were wholly without protection or covering, and that by reason of their being so exposed rendered the walks and ways about the tracks and between said tracks where plaintiff was obliged to walk and work unsafe and dangerous, as they were without signal lights and could not be seen in the darkness, and in the night season formed a trap composed of wires stretched across the runway between said tracks, so that employees might be entrapped thereby while discharging their duties to the defendant in the night season," and that defendant was "careless and negligent in failing to properly guard or cover said wires and pulley wheel in and about said runway, and thus protect its employees from danger of being entrapped in the darkness and thrown under moving cars; that it was unlawfully careless and negligent in failing to provide safe walks and ways about which plaintiff could discharge his duties to the defendant in the darkness and storm without being entrapped and thrown under moving cars and injured; that defendant was unlawfully careless and negligent in failing to provide a signal light about said exposed wires and pulley wheel in said runway, so that plaintiff, in discharging his duties to the defendant, might have seen said pulley wheel and wires and thus escaped injury to himself; that defendant was unlawfully careless and negligent in the maintenance of the walks and ways of said tracks in said yard where plaintiff was obliged to work, and that it failed to keep them safe and free from the dangers which caused plaintiff's injury as aforesaid" (R., pp. 7, 8).

The answer is a general denial, in which contributory

negligence is alleged (R., p. 9). The reply denies the allegations contained in the answer as a matter of defense (R., pp. 9, 10).

At the conclusion of plaintiff's evidence the defendant asked the court to instruct the jury to return a verdict for the defendant, on the alleged ground that the evidence disclosed that plaintiff assumed the risk of the dangers of his employment, and that defendant claimed immunity from liability under the Employers' Liability Act of Congress of April 22, 1908. This motion was overruled and defendant excepted. The defendant then introduced evidence tending to show that it was engaged in interstate commerce, and at the conclusion of all of the evidence renewed its motion to direct a verdict in its favor upon the same ground alleged in its former motion, which motion was also overruled and defendant excepted (R., pp. 81, 82, 87). The defendant then requested the court to charge certain requests, claiming that said act applied, that plaintiff assumed the risk under said act, and that the jury should pass upon the question of assumption of risk. These requests were refused and the defendant excepted.

In his general charge to the jury the court charged the law as provided in the General Code of Ohio (R., pp. 87, 88, 89, 90, 91), to which charge the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of five thousand dollars ($5,000.00), and the defendant's motion for a new trial was overruled and judgment entered on the verdict (R., p. 11).

On error proceedings in the Circuit Court the judgment was affirmed. It was later affirmed by the Supreme Court of Ohio, and is found reported in 89 O. S., p. 81.

Assignment of Errors.

Of the twenty-six assignments of error in its brief plaintiff in error relies upon the following:

> "Fifth. That the court erred in refusing to give, and not holding it error to refuse to give defendant's first request to charge as follows, to wit:
>
> " 'First. At the conclusion of all of the evidence in the above-entitled action, the defendant asks the court to arrest the testimony from the jury, and to direct the jury to return a verdict in favor of the defendant' " (R. p. 97).
>
> "Eighth. That the court erred in refusing to give, and not holding it error to refuse giving defendant's fourth request to charge as follows, to wit:
>
> " 'Fourth. If you find at the time of plaintiff's injuries, the defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, and if you further find that while so engaged, and prior to and at the time of receiving his said injuries, the plaintiff had knowledge of the character of the interlocking device, and the rails, tracks, place of work, and appliances generally connected with his said accident, and knew and understood the method and manner of construction thereof, and knew and appreciated the dangers and hazards incident thereto, and incident to his said employment, in such situation, he cannot recover in this case, and your verdict must be for the defendant for the reason that, under the provisions of the Employers' Liability Act of Congress of April 22nd, 1908, he, in such situation, assumed the risks, and your verdict must then be for the defendant' " (R., p. 98).
>
> "Tenth. That the court erred in refusing to give, and not holding it error to refuse giving defendant's fifth request to charge, as follows, to wit:
>
> " 'Fifth. The court says to you, as a matter of law, that if you find that plaintiff was injured while defendant was engaged in interstate commerce, and plaintiff was employed by it in such commerce, then the rights and liabilities of both of said parties are

governed, and determined by the act commonly known as "The Employers' Liability Act of Congress of April 22d, 1908;" and that said act is exclusive of any and all legislation by the State of Ohio, on the same subject, and your verdict, so far as the law of this case is concerned, must be governed by said Federal statute as interpreted and explained to you by the court'" (R., pp. 98, 99).

"Fifteenth. The court erred in charging the jury as follows:

"'At common law this plaintiff would have assumed the risk of working in this yard with these wires in that situation if he had known it. I do not know what you may find and conclude as a matter of fact as to whether he did know it or not, but he seems to have worked there a great many years in and about this place, but under this statute the fact that he knew the wires were there would not relieve the defendant company of its liability to him so far as the question of its negligence is concerned, for the reason that the statute expressly provides now that if the defendant company be negligent in respect to its ways where its men operated, the men are not held as a matter of law to have assumed the risk of the situation as they would be at common law'" (R., p. 100).

"Twenty-fourth. The court erred in holding:

"'It follows, therefore, that if the plaintiff in error desired to avail itself of the benefit of the Federal act, it should plead such facts as would bring the transaction within the operation of that act'" (R., p. 101).

"Twenty-fifth. The court erred in holding:

"'The important inquiry is as to what he was doing at the time the accident occurred, and it appears without dispute in this record that he had finished the duties required of him by prior orders of the master, and was at the time of the injuries proceeding to the master's office for further orders and direction as to his service, so that he was not then and there employed in moving or handling cars engaged in interstate commerce. That service had been fully completed and ended, and he had not re-engaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident

actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would require would be of interstate character cannot and does not establish the fact that at the time of the injury he was so engaged" (R., pp. 101, 102).

Synopsis of Argument.

There is no contention as to the Federal Employers' Liability Act of 1908 being exclusive and that it would supersede the statute of Ohio in cases where it can properly be applied.

It is our contention—

First. The plaintiff was engaged in intrastate commerce when he was injured.

Second. The statutes and laws of the State of Ohio apply to this case.

ARGUMENT.

First. *The plaintiff was engaged in intrastate commerce when he was injured.*

If the evidence shows plaintiff, at the time he was injured, was engaged in intrastate commerce it would seem that all other questions raised by defendant would necessarily fall.

We call the court's attention to the evidence and facts found in the record relating to movements of Welsh when he was injured.

Immediately before Welsh was injured he had moved eastward from what was known as No. 1 track at the Erie freight house and took a caboose "on down to Fitch's warehouse" (R., p. 53).

There is nothing in the record showing the caboose had ever been used in interstate commerce, and all that we know

concerning it relates to its intrastate movement from the Brier Hill Yard with an interstate car of merchandise attached, which car of merchandise was disposed of on No. 1 track at the Erie freight house, after which plaintiff proceeded with the lone caboose attached to the locomotive. After placing this caboose he started to the yardmaster's office, where the order he had just been executing would run out and a new one would be given to him. When he reached a point several yards east of the yardmaster's office he stepped off of the running board of the locomotive, in order to avoid interlocking, which he knew was in front of the yardmaster's office, but which he did not know was at the place of accident (R., p. 34). As he stepped from the locomotive he was thrown under its moving wheels by the interlocking pulley wheel and wires (R., pp. 26, 27). It will be observed that Welsh was injured just when completing the execution of an order which required him to go from the Brier Hill Yard to F. D. Yard, about a mile and one-half away, and there deposit an interstate freight car on track No. 1, at the Erie depot, and then "go on down the track" and deposit a caboose in Fitch's Pocket, and on this trip he did four things:

(*a*) Took an interstate freight car and an intrastate caboose from the Brier Hill Yard to F. D. Yard.

(*b*) At F. F. Yard he deposited and left the interstate car on track No. 1, near the Erie freight house.

(*c*) He left the F. D. Yard with an intrastate caboose and took the same, without any other cars attached, to the main track and then "on down the track" to "Fitch's Pocket," in the city of Youngstown, Ohio.

(*d*) He then returned westward to the point where he alighted from his engine east of the yardmaster's office.

It is urged by the railroad company's brief (pp. 13, 14):

1. That because the fireman watered the locomotive, that this act should be charged to Welsh.

2. Said brief further urges that Welsh was engaged in interstate commerce, because had he not been injured he would have been given orders relating to interstate commerce, and that such orders were actually given to the crew immediately after the accident.

3. That the "switching trip" was interstate, because an interstate car was hauled part of the distance.

4. That going from the locomotive to the yardmaster's office was interstate, because orders there awaiting him related to interstate commerce.

(*a*) The fact that Welsh carried an interstate car on part of the switching trip, but disposed of the same finally and definitely in the F. D. Yard before proceeding further with the intrastate caboose "on down the road," does not make the whole trip interstate if the two movements were separable. There could be no question as to the movement being strictly intrastate if the interstate car had not been taken on a part of the trip. The fact it was taken half way and then left on a siding, after which the second movement with the caboose was made, does not make the second movement one "so blended" with the first that they cannot be separated, and we believe the attempt to so interblend and overlap these movements to be unwarranted.

(Quoting from Roberts on Injury to Interstate Employees on Railroad, pp. 83, 84, 85, 86:)

> "The sole test in determining whether switching crews employed in railroad yards are engaged in interstate commerce is whether at the very moment of the accident they are assisting in moving interstate

trains, that is, cars either loaded or empty, originating in one State and destined to a point in another State, territory or foreign country."

"In the case of Ill. C. R. Co. *vs.* Behrens, 233 U. S., 473; 58 L. Ed., 1051, a fireman on a switch engine was killed. The switching crew, of which he was a member had been engaged in moving interstate commerce a short time before he was killed and the crew intended within a short time to again resume the work of moving cars loaded with interstate freight, but at the time of the accident the switching crew, including the fireman, was employed in moving a train of empties from one point in New Orleans to another, all the cars in the 'drag' having originated and being destined to points within the same State. Under these facts the United States Supreme Court held that the fireman who was engaged was killed by the negligence of a co-employee was not engaged in interstate commerce within the meaning of the act. This was the first case reaching this court under the Employers' Liability Act of 1908, in which it was held that the employee was not engaged in interstate commerce at the time of the accident. The reason, as given by the court for so holding, was that since the act provided that the servant, in order to recover, must be injured 'while he is employed by such carrier in such commerce' and since the switching crew at the time was only moving intrastate cars, the fireman while so working was not within the terms of the act."

(Quoting from Thornton's Federal Employers' Liability Act, third edition, pp. 64, 65, 66:)

"As the employee must be engaged in the interstate commerce of his employer, from the very nature of the question, his employer at the moment of the injury must be engaged in interstate commerce, not generally but in that specific instance, and in that identical commerce he must be injured if he recovers under the statute."

Hammill *vs.* Pennsylvania R. Co. (N. J.), 94 Atl., 313.

In discussing the terms of this act this court, in the case of Pederson *vs.* D., L. & W. R. R. Co., 229 U. S., 57; L. Ed., 1135, said: "There can be no doubt that the right to recover thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce"; and it declares that "the true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In the case of Charleston & W. C. Railroad Company *vs.* Anchors, 10 Ga. App., 322; 72 S. E., 551, the rule is stated as follows:

> "1. The railroad company in question must be engaged in interstate commerce. 2. It must be at the time of the injury in question be engaged in that character of commerce, as contradistinguished from purely local matters as it may also engage in. 3. The injured servant must also at the time of receiving his injury be engaged in interstate commerce; and the test is, according to Behrens case, 'the nature of the work being done at the time of the injury.'"

(*b*) Since the interstate car of merchandise was left on the side track at the Erie freight house and thereafter formed no part of the train in charge of Welsh, and that this train then proceeded "on down the track," and consisted only of a locomotive and a caboose, neither of which was in any way attached to or connected with anything interstate, we state in the language of Mr. Justice Van Devanter, speaking for this court in the Pederson case, "and so we are only concerned with the nature of the work in which the plaintiff was engaged at the time of the injury." Among the questions which naturally arise in this connection are these: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?" "Was its performance a matter of indifference, so far as that com-

merce was concerned"? According to the evidence found in the record the interstate car was far distant, not only from the place of injury, but from the place to which the intrastate caboose was deposited. The handling of this caboose was done independently of the freight car after the latter had been uncoupled and deposited on the side track near the Erie freight house, so that the caboose was moved away and was not "so closely connected" with the interstate car, and the handling of the caboose thereafter was a matter of indifference so far as interstate commerce was concerned.

(*c*) As soon as Welsh left the F. D. Yard with the caboose he left the interstate freight car on a siding and left the yard containing the siding, taking the main line "on down" to Fitch's Pocket. This was an independent movement, carrying out a part, the third lap, of his orders.

(*d*) After depositing the caboose in Fitch's Pocket Welsh undertook to carry out the fourth lap of his orders, and started on his return to the yardmaster's office, all in the city of Youngstown, Ohio.

1. It is urged that because the locomotive was watered by the fireman on the trip from Brier Hill Yard this act should be charged to Welsh, and that this was interstate. There is nothing in the record showing that Welsh had anything to do with the feeding or maintenance of the locomotive. It is well known, however, that the yard conductor has nothing to do with maintaining, coaling, oiling or watering the locomotive. This work devolves upon the fireman, engineer, and hostler.

2. In answer to the claim that Welsh was engaged in interstate commerce because, had he not been injured, he would have received orders relating to the handling of interstate

cars, we again quote from the opinion of the court delivered by Mr. Justice Van Devanter in the Behrens case:

> "Here at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury. The question is correctly answered in the negative."

3. It is claimed the "switching trip" was interstate because an interstate car was a part of the same. There might be some ground for this contention if Welsh had disposed of the caboose first and then proceeded "on down the track" with the interstate car of merchandise, but this order was reversed and Welsh had dismissed the interstate car from his train in the F. D. Yard and then started out with a purely intrastate train on the main track down to Fitch's Pocket, and no movement of his had aught to do with interstate commerce after setting off the interstate freight car in the F. D. Yard, and there was neither overlapping with or blending of or through this space between the cars and the caboose after their separation.

4. The contention that there were interstate orders waiting for Welsh had he returned to the yardmaster's office is answered by the language quoted from Mr. Justice Van Devanter in the Behrens case, *supra*.

It will be observed that we have referred to the caboose as an intrastate car. The record shows only that this caboose was picked up at the Brier Hill Yard, in Ohio, and carried from there to Fitch's Pocket, another point in Ohio.

"When empty cars, which had been delivered to the owner, the Pa. Ry. in New York, reached the first distributing point in Pa., there interstate character ceased, and when sent on subsequent journey to other distributing points in Pa. they were not in interstate commerce."

218 Fed., 748, Pennsylvania R. Co. *vs.* Knox.

"When cars from Tennessee reached their destination in Kentucky, their interstate journey was at an end, and when they were taken further in Kentucky, on new orders received at the original point of destination, they were intrastate commerce."

161 S. W., 239, L. & N. R. Co. *vs.* Strange,
156 Ky., 439.

We cite the following authorities in support of our contention:

"A switchman engaged in switching cars containing no interstate freight and which cars did not pass out of the State during the trip, was engaged in intrastate commerce."

148 N. Y. S., 769, Norton *vs.* Erie R. R. Co.

"The provisions of this act are limited to injuries occurring which the particular service in which the employee was engaged was a part of interstate commerce."

106 N. E., 843; 107 N. E., 60.
Patry *vs.* Ca. & W. I. R. Co.
Corbett *vs.* Boston & M. R. R.

"The true test is whether the work in question was a part of the interstate commerce in which the carrier is engaged."

83 S. E., 573, Saunders *vs.* Southern Ry. Co.

"In order to bring the case within the terms of the Federal act, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in

such commerce. If these facts appeared, the Federal act governed to the exclusion of the statutes of the State."

232 U. S., 248; 58 L. Ed., 591.
34 S. C. R., 305.
N. C. R. Co. *vs.* Zachary.
N. C. R. Co. *vs.* Zachary.

"In order for the plaintiff to recover he must establish that the defendant owned and operated a common carrier railway and was engaged in interstate or foreign commerce, and that the plaintiff was employed by the defendant in such trade or commerce and was injured while so employed."

211 Fed., 717, Bav *vs.* Merrill Ring Lumber Co.

"Where a fireman at the time of the fatal injury was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another, he was not engaged in interstate commerce, and the fact that upon the completion of this task, he was expected to engage in another which would have been a part of interstate commerce was immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

233 U. S., 473; 58 L. Ed., 1051.
34 S. C. R., 646, reversing 192 Fed., 581. See 221 Fed., 1012.
148 N. Y. S., 1034.
217 Fed., 967, Ill. C. R. Co. *vs.* Behrens.
Shanks *vs.* D., L. & W. R. Co.

"It is established by the decisions that in enacting the Employers' Liability Act of 1908 Congress intended to confine the operation of the statute to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce, and that the test is whether the employee at the time of his injury was employed by a carrier then engaged in interstate commerce."

221 Fed., 335, citing 233 U. S., 473; 58 L. Ed., 1051; 34 S. C. R., 646.
221 Fed., 453, Boyle *vs.* Pennsylvania.
Erie Railroad Co *vs.* Jacobus.

"The actual work being performed at the time of the injury determines its character and is the real test whether it is interstate or intrastate work."

153 N. Y. S., 179, Parsons *vs.* Del. & H. Co.

"A brakeman running between points within a State, injured while coupling intrastate cars, was not engaged in interstate commerce because of the fact that the train, when made up was to contain interstate cars.

145 Pac., 1148, A., T. & S. F. Ry. Co. *vs.* Pitts. (Okla.).

"Both the injured party and the carrier must be engaged, at the time of the infliction of the injury, in interstate commerce."

221 Fed., 52, Ill. Central R. Co. *vs.* Rogers.

"If the mere fact that a railroad may be used at times, frequently or otherwise, for interstate commerce transportation, fixes the status of all employees as being engaged in interstate commerce within the meaning of the acts of Congress, without reference to the duties they were performing at the time of the injury, it would follow that all employees no matter how incidentally or remotely their duties had to do with interstate commerce generally, or what kind of commerce they were engaged in when injured, would come within the purview of the Federal statutes when they brought an action to recover damages. To so hold would mean the wiping out of all State regulations and authority in matters relating to the personal injuries of railroad employees. The cases have not gone so far, and we do not see how the rule can be laid down so broadly without doing violence to the plain language of the commerce clause of the Constitution, which limits the Federal power to interstate subjects. Our view is that in cases like the one at bar commerce must be regarded as of two kinds, intra- and interstate, and the status of the employees must be determined by the kind of commerce they are engaged in at the time the injuries were sustained. If they were engaged in interstate commerce the acts of Congress apply; if they were en-

gaged in intrastate commerce the Federal statutes have no application. All of this depends upon the facts, and in order to make out a case under the acts of Congress, plaintiff must prove that the injured person was engaged in interstate commerce at the time of the accident."

Hench *vs.* Pennsylvania R. Co., 246 Pa., 1 (1914).

"In an action to recover damages for the death of a yard switchman, it appeared that intestate was riding on a freight car in defendant's yard when he was knocked off by a baggage truck which had been carelessly left between the tracks by a baggage man. The case was submitted under the Federal Employers' Liability Act. There was a judgment for plaintiff for $5,500.00. In reversing the judgment and holding that although the defendant was engaged in intrastate and interstate commerce, it did not appear that the particular service in which plaintiff's intestate was employed at the time he was injured was a part of interstate commerce, the court said: 'Defendant's railroad extends through several States. Freight trains coming into the Hornell Yard are broken up and new trains formed; others pass through unbroken. The general work of the yard crew to which the deceased belonged was shifting and classifying cars and doing general switching work in the yard. Plaintiff's intestate was injured at the time he was assisting in the work of moving six freight cars. Although the cars came in fast through freight, they were put in the train at Buffalo and left at Hornell, at no time during the trip passing out of the State. The train which brought them had proceeded on its journey several hours before the accident occurred. There is no proof that any of them contained freight coming from outside the State or that the cars were in use in interstate traffic in any way at the time of the accident." The court held, therefore, that the case in question did not fall within the act.

Norton *vs.* The Erie R. Co., 163 App. Div. (N. Y.), 466 (1914).

"A freight conductor was injured while operating a train between two points in the same State, which consisted solely of an engine and the way car. The train crew of which this conductor was a member, was not returning from a trip after hauling empty or loaded cars between the States, but was returning without transporting any commerce from one State to another. Under these facts the court said: 'They were carrying instrumentalities which had been and probably would be used in the future for interstate and intrastate transportation combined, or only for intrastate purposes, or perchance for interstate commerce only. I cannot find that it has been decided that such act constitutes interstate commerce, but it has been in principle decided that it does not."

McAuliffe *vs.* N. Y. C. & H. R. Co., 150 N. Y. Sup., 512.

Notwithstanding trains as a rule carry interstate commerce, cases have been passed upon in which the courts have held, and properly so, that the employee's remedy was governed exclusively by the State law, because of the fact that the train on which he was working contained only intrastate shipments. For instance, a switching crew for a railroad company worked sometimes during the day in transporting interstate shipments and at other times in hauling intrastate freight. The plaintiff was a member of this switching crew working on a short line terminating at a smelting works. This crew made three or four trips a day out to the main line, hauling cars containing both intrastate and interstate shipments. At other times while on duty they were engaged in switching the coal and coke cars from what were known as the "coke tracks" to other points nearby, all in the same State. The plaintiff was injured while employed in assisting in the transportation of the intrastate shipments, and the court held that he was engaged solely in intrastate commerce at the time, and that his remedy was governed exclusively by the laws of the State where the casualty occurred.

(Southern Ry. Co. *vs.* Murphy, 9 Ga. App., 190.)

Opinion of the Supreme Court of Ohio.

The Supreme Court of Ohio held that plaintiff was not engaged in interstate commerce when injured, and made this the determining question, as shown by the following pertinent part of the opinion:

> "In this case, however, it does not appear that there is any conflict of evidence, at least no material conflict. If we are correct in the proposition that the presumption obtains that the law of the forum applies to the transaction, then it is necessary in order to overcome the presumption to show that the plaintiff at the time of the injury was actually employed in moving or handling cars engaged in interstate traffic. Notwithstanding his employment may have been entirely local and wholly within the State, yet, if in the course of his service it became his duty to handle or assist in handling cars engaged in interstate commerce, either by taking them out of or putting them into trains, or shifting them about the various parts of the railway yards, he must be held to have been engaged in interstate commerce, while actually so engaged in this service, and the Federal laws upon that subject would apply to any transaction occurring while he was actually so employed. There is some evidence in this record that shortly before his injury he was assisting in shifting a car containing interstate traffic en route for Meadville, Pennsylvania, but it also appears that after that service had been performed he had handled a caboose and placed it in "Fitch's Pocket," and there is no evidence whatever tending to show that this caboose was engaged in interstate commerce. There is also some evidence tending to show that the next service he would be required to perform would be in relation to cars engaged in interstate commerce, but what he had been doing before the time of the accident or what he might have done shortly thereafter, if the accident had not happened, is not very important in determining this question. The important inquiry is as to what he was doing at the time the accident occurred,

and it appearing without dispute in this record that he had finished the duties required of him by prior orders of the master, and was at the time of the injury proceeding to the master's office for further orders and directions as to his service, so that he was not then and there employed in moving or handling cars engaged in interstate commerce. That service had been fully completed and ended, and he had not reengaged in any similar employment, so there is no evidence in this record tending to prove that at the time the accident actually happened this plaintiff was then and there engaged in interstate commerce, and the mere fact that shortly before that time he had been so engaged, or that the next service his master would require would be of interstate character, cannot and does not establish the fact that at the time of the injury he was so engaged. The facts in this case having wholly failed to show that plaintiff was engaged in interstate commerce at the time of the accident and injury, the law of the forum applies, and the trial court properly gave in charge to the jury the law of the State.

Erie R. R. Co. *vs.* Welsh, 89 O. S., pp. 87, 88, 89.

Conclusion.

In determining this case, and whether plaintiff was engaged in interstate commerce at the time of his injury, the Supreme Court of Ohio followed the same line of reasoning found in the Behrens and Pederson cases. There was no conflict in the evidence touching the movement of Welsh and his service to the railroad from the time he left the interstate freight car in the F. D. Yard, from which he took his train *out on the main line* and then proceeded "on down the track" to "Fitch's Pocket" with a purely intrastate train. It is only contended in argument that Welsh was engaged in interstate commerce after leaving, with his train, the F. D. Yard and returned to the place of injury. In making its finding of facts, and applying the law to the same, the Su-

preme Court of Ohio construed the law without attempt to narrow or expand. The court based its opinion, among other things, upon what the plaintiff was doing at the time he was injured, and passed upon the service actually being performed at the time the injury occurred, and in a very pertinent manner stated, "The important inquiry is as to what he was doing at the time the accident occurred."

It would seem that the position taken by the Ohio Supreme Court is in harmony with the holdings of this court; were not such the fact it would seem well-nigh impossible for a trainman employed in the yard of an interstate railroad in the capacity of yardmaster or trainman to ever engage in intrastate commerce, and in answer to the final conclusion contained in the brief of the railroad company in which it submits "That the act of stepping from the engine after the completion of the trip to F. D. Yards, and preparatory to going to the yardmaster's office for further orders, was an act so closely connected with interstate commerce as to be a part of it, and its performance is not a matter of indifference so far as that commerce is concerned," is fully answered in the last two paragraphs of the opinion of this court in the Behrens case heretofore quoted.

Therefore we respectfully submit that the judgment of the Supreme Court of Ohio shall be sustained.

Respectfully submitted,

WILLIAM R. STEWART,
Attorney for Defendant in Error.

Received a copy of the above brief this 21st day of March, 1916.

C. D. HINE &
LEROY A. MANCHESTER,
Attorneys for Plaintiff in Error.

ERIE RAILROAD COMPANY *v.* WELSH.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 29. Argued October 25, 1916.—Decided December 18, 1916.

That a case may be within the Federal Employers' Liability Act (c. 149, 35 Stat. 65), it is essential that the person injured be employed at the time of injury in some task of interstate commerce; mere expectation of such employment is not enough. So *held* where the employee, subject to be employed in either interstate or intrastate commerce as directed by a superior, was injured while in quest of orders, and, but for the injury, would have received orders requiring him immediately to make up an interstate train.

In cases brought here under the Federal Employers' Liability Act, the rule obtains that, in the absence of manifest error, this court will not disturb concurrent findings of state trial and appellate courts that the evidence of employment in interstate commerce was insufficient to go to the jury.

89 Ohio St. 81, affirmed.

THE case is stated in the opinion.

Mr. Leroy A. Manchester, with whom *Mr. C. D. Hine*, *Mr. James B. Kennedy* and *Mr. John W. Ford* were on the brief, for plaintiff in error.

Mr. William R. Stewart for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Supreme Court of Ohio (89 Ohio St. 81) affirmed a circuit court judgment which sustained a judgment re-

covered in a court of common pleas by Welsh against the Erie Railroad Company for damages on account of personal injuries suffered by him while in its employ as a yard conductor in the Brier Hill yard, near Youngstown, Ohio; overruling the contention of the defendant (now plaintiff in error) that by certain rulings of the trial court defendant had been deprived of rights secured to it by the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65.

Plaintiff's case was that on March 7, 1911, about 11 o'clock p. m., while in the performance of his duties, he attempted to alight from the footboard of a slowly moving locomotive; that in so doing he stepped upon a pulley wheel of an interlocking mechanism situate between the tracks and then covered with snow, and the turning of the wheel under his weight caused his foot to become entangled in the interlocking wires, as a result of which he fell partly under the locomotive and sustained serious injuries. The negligence attributed to defendant was the failure properly to guard or cover the wires and the pulley wheel. There was evidence tending to show such a knowledge on plaintiff's part of the nature and character of the interlocking apparatus and its location between the tracks, and such a knowledge and appreciation of the dangers incident thereto, as to bring into play the defense of assumption of risk (*Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503; *Jacobs* v. *Southern Railway Co.*, 241 U. S. 229, 234), if the case came within the federal act; and this depended upon whether plaintiff was employed by defendant in interstate commerce at the time he received his injuries. Defendant's Fourth Request was for the submission to the jury of the question whether plaintiff was employed in such commerce, with an appropriate instruction embodying the rule as to assumption of risk in case they should find him to have been so employed. This request, which in terms invoked the protection of the act of Congress, was refused, and the trial court, in the in-

structions given, declined to follow that act or the common law, and on the contrary instructed the jury that under a state statute held to be applicable the assumption of risk was not a defense.

The rulings of the trial court were sustained by the Supreme Court (and presumably by the Circuit Court) upon the ground that, upon the undisputed evidence, plaintiff was not at the time employed in interstate commerce. As to this question, there was testimony tending to show that defendant was a common carrier by rail engaged in commerce between the States, and that plaintiff was and for some time had been a yard conductor engaged in night duty at its Brier Hill yard, a mile or more west of Youngstown; that he performed miscellaneous services in the way of shifting cars and breaking up and making up trains, under orders of the yardmaster, and had to apply frequently to the latter for such orders; that when any orders thus given had been performed, or had "run out," he usually reported at the yardmaster's office for further orders; that on the night in question plaintiff, with a yard crew, took a freight car loaded with merchandise destined to a point without the State, and a caboose which so far as appears was not to go beyond the limits of the State, from the Brier Hill yard eastwardly to the "F. D. yard" in Youngstown, where the freight car was placed upon a siding, so that it might be made up into a train by another crew; that they then took the caboose a short distance farther and placed it upon another siding; that they next took the engine to a water plug and took on water, and then returned with it to the Brier Hill yard; that on this return journey the engine was slowed down near the yardmaster's office, which is at the easterly end of that yard, so as to enable Welsh to report for further orders, all previous orders having been executed; and that the injury was received while he was attempting to alight for that purpose.

It was in evidence, also, that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478.

There remains the contention that plaintiff's act in stepping from the yard engine was in completion of his trip to the "F. D. yard" with the interstate car, and hence was itself an act in furtherance of interstate commerce. This cannot be answered by saying, in the words used *arguendo* by the state Supreme Court (89 Ohio St. 88), that "he was not then and there employed in moving or handling cars engaged in interstate commerce." The question remains whether he was performing an act so directly and immediately connected with his previous act of placing the interstate car in the "F. D. yard" as to be a part of it or a necessary incident thereto. *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 264; *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 559. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task. It turns upon no interpretation of the act of Congress, but involves simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment

in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that in the proper exercise of the jurisdiction of this court in cases of this character, the decision ought not to be disturbed. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466.

Judgment affirmed.